JOINT ABSTRACT OF RECORD

(ARRANGED ACCORDING TO SUBJECTS OF PROOF)

No. 16 ORIGINAL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, PLAINTIFF

vs.

THE STATE OF OREGON, DEFENDANT

Testimony taken before

GARRET W. McENERNEY, ESQUIRE

Special Master

INDICES

AND

TOPICS A to D.5.(*h*)

PAGES 1 to 630

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STIPULATION

Joint Abstract of the record of the evidence taken before the Special Master herein, and submitted by respective counsel on behalf of the parties litigant herein, in the form directed by him.

This Abstract represents the condensation of the record in this case filed with the Special Master. It has been placed in narrative form according to the subjects of proof, and without regard to the chronology in the taking of the evidence before the Special Master.

In this Abstract the explanatory interpolations between parentheses are agreed by respective counsel to be included for clarification and accuracy of the testimony.

Since the trial of this case before the Special Master at Burns, Oregon, there has been incorporated in this Abstract by agreement of respective counsel certain evidence listed and described at pages 5 and 6, Volume I, of this Abstract.

CHARLES M. BLACKMAR,
Special Assistant to the Attorney General,
RANDOLPH S. COLLINS,
Attorney, Department of Justice,
W. F. STALEY,
Assistant Solicitor, Department of Agriculture,
Counsel for the Plaintiff.

I. H. VAN WINKLE,
Attorney General of Oregon,
L. A. LILJEQVIST,
Assistant Attorney General of Oregon,
Counsel for the Defendant.

DESCRIPTIVE INDEX OF ALL EXHIBITS

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PERSONAL HISTORY OF WITNESSES

Mr. JESSIE O. ALBERSON, called as a witness for the plaintiff, testified in substance as follows:

I am 56 years of age and I reside at Diamond, Oregon.

I came to Harney Valley in the fall of 1886 and I have remained here ever since. (R. 1271.)

Mr. EDWARD ANDERSON, called as a witness for the plaintiff, testified in substance as follows:

I will be 50 years of age in February, 1932. At the present time I reside at Burns, Oregon.

I first came to Harney Valley in 1888 (R. 1281), and I have lived here practically all the time since then. (R. 1282.)

Mr. JOE ORMAND AUSMUS, called as a witness for the plaintiff, testified in substance as follows;

I am 40 years of age.

I have lived in Harney County since 1898.

I and some other members of my family have a place down there in the (Lake Malheur) Bird Reserve where we have lived continuously since 1904. I think there are about 2,500 acres in the place. There is really more than that now, but we always used about 2,500 acres; but we used more this summer than that. (R. 2127.)

Prior to the time I moved on that place it had been occupied by Warren Joergan, from whom I and other members of the family bought the improvements. (R. 2127–2128.) There was a house there on it at that time; some corrals and some outbuildings.

The same place and the same house is the one that has been described (here) as the Turner place. (R. 2128.)

Mr. EMIL BAKER, called as a witness for the plaintiff, testified in substance as follows:

I am a cousin of Mr. James Thomas Baker, who has just testified.

I am 51 years of age, and I reside about eight miles from Burns. I have lived in Harney Valley practically all of my life.

During my residence here, I have worked with cattle down at Malheur Lake a good deal of the time. I rode for two different outfits. The first one was called Harden & Riley, which is now called the OO Ranch. (R. 587–588.)

The other outfit I worked for was the P. L. S. Company, at the Island Ranch. (R. 588.)

As near as I can remember, I was twelve years of age when I started riding; that was somewhere about 1892 or 1893 that I went there on the Harden Ranch. (R. 589.)

Mr. JAMES THOMAS BAKER, called as a witness for the plaintiff, testified in substance as follows:

My age is 65 years, and I live out northeast of Burns, about six miles. First came into Harney Valley in 1878 and stayed here until 1880. During that period I was not around the lakes at all. (R. 572.)

I returned again in 1885 and went to work for Todhunter & Devine at the Island Ranch, riding for stock. I stayed there until the spring of 1890, and during that time was engaged in driving cattle in and out of the lake, nearly every year. I am mostly familiar with the north side of Malheur Lake for the full distance from east to west. (R. 573.)

I am familiar with Pelican Island, Cole Island, and there is another island near there we used to call Cane Island, right along in there, that I possibly have been on. (R. 575.)

I have not been down to Malheur Lake there much in recent years. (R. 581.)

Mr. ROBERT DILLARD BAKER, called as a witness for the plaintiff, testified in substance as follows:

I am 56 years of age and at the present time I reside right up the river 7 miles northwest of Burns, Oregon.

I first came into Harney Valley in 1876, and became familiar with Malheur Lake about 1890. At that time I worked with cattle for the Pacific Livestock Company on the Island Ranch. (R. 1073.) I only worked there about two or three weeks that time. The next year I was there again for a little while, and then I went into Anderson Valley and worked the biggest part of that summer. Then I was backwards and forwards several times to Harney Valley working for the company, both here and over at Whitehorse. (R. 1074.)

Cross-examination:

I never was around the Sand Reef in the early days. I was not down around Harney Lake a lot. I was down to the Warm Spring (R. 1082) Ranch, but I do not know I was to Harney Lake. The Red "S" Field which is northerly of Malheur Lake I suppose is on surveyed land.

I know Mr. Ruh but I do not know where his land was located. (R. 1083.)

Mr. WILLIS GEORGE BARDWELL, called as a witness for the plaintiff, testified in substance as follows:

I am 67 years of age and at the present time reside at Burns, Oregon.

I first came into Harney Valley in 1884. I left here in 1887. Between 1884 and 1887 I worked for different stockmen (R. 947), principally for Harden & Riley, for whom I worked cattle.

I returned in 1898 and I have lived here ever since. In 1898 I did ranch work, working principally for the OO Ranch.

Between 1884 and 1887 I was around Harney Lake a good many times. (R. 948.)

In the early days I did not have very much experience around Malheur Lake. (R. 952.)

From 1885 to 1887 I did not have occasion to pass by Malheur Lake. (R. 953.)

Mr. GEORGE M. BENSON, called as a witness for the defendant, testified in substance as follows:

I am 53 years of age and reside at Voltage, Oregon.

I am Reserve Protector of the Lake Malheur Bird Reservation, Harney County, Oregon.

I first saw Malheur Lake in the fall of 1909 but I was not Game Protector at that time; I settled there on that lake at that time near the south meander (line) of the (Malheur) lake on the Blitzen River. The place I settled on (in the fall of 1909) was the place that is marked on the map, Plaintiff's Exhibit 3, as "The Benson Cabin" in Section 25, T. 26 S., R. 31 E., south of the lake. My cabin was on unsurveyed land inside of the Neal Meander Line. I have held that cabin ever since.

I was called as a witness by the Government at the hearing held before the Honorable Garret W. McEnerney last fall (1931), but I was not on the stand. I attended the trial a number of days. I do not know the day that I was called, I guess I was sick. I was sick for several days (at that time).

In the fall of 1909 when I located on the south side of Malheur Lake (R. 2498) myself and Frank Caldwell lived in a tent the first year and trapped. We lived at that time at the same place where the cabin now is located.

I did not build the cabin. I bought it from Tim Crowley in the swamp, in the west part of the (Malheur) lake, and moved it up there. I did not tear it down and rebuild it; I just put it on skids. (R. 2499.) I do not remember the date I moved the cabin there but it was within a few years after the fall of 1909. (R. 2500.)

I became Warden of the Lake Malheur Bird Reservation September 1, 1918, and I have been warden ever since. (R. 2503.)

Mr. JOHN W. BIGGS, called as a witness for the plaintiff, testified in substance as follows:

I am 61 years of age, and reside near Burns, Oregon. I am a lawyer.

I have lived in Harney Valley since January, 1893, with the exception of about one year. I taught at Canyon City during the winter of 1893 and 1894, and was away from here during that school year.

I have been down to Malheur and Harney Lakes frequently. There are certain circumstances connected with certain trips that I remember those directly from the circumstances, and remember the dates exactly.

The first time I ever saw Malheur Lake was in June, 1893; school at Burns had just finished, and in visiting the different schools with the County School Superintendent, I went out to the Nine Mile Slough, crossed it, went down by Windy Point, and at that time I saw Malheur Lake for the first time while going to visit the school in Happy Valley or in Diamond.

In the winter of 1894, I was acting as deputy United States Marshal when Peter French or the French-Glenn Livestock Company started suit in the Federal Courts against all of the settlers on the south side of Malheur Lake. I spent quite a little time that winter serving papers down there. I crossed at the Narrows and served papers there.

In 1903 John T. Whistler, in charge of irrigation work for the Government for eastern Oregon, had an idea that the Silvies River (R. 1487) would not furnish hardly enough water to irrigate here, but that he could bring the water from Logan Valley across into Bear Valley and use it here, then they could dam up the west side of Malheur Lake and cut a channel from there to the Malheur Lake, so that the same amount of water, after it had been used through here, could pass on down. I spent probably a week with him, principally around the south side of the lake, between Malheur Lake and the south fork of the Malheur River. (R. 1487.)

Mr. JEFF D. BILLINGSLEY, called as a witness for the plaintiff, testified in substance as follows:

I am 69 years of age, and my home is in Ontario, Oregon. I never lived in Harney Valley. I have been in this country since 1880 and during that time I have had occasion to visit Lakes Malheur and Harney.

In 1880, the first time I saw Malheur Lake, I was stationed down below what is known as the Circle Bar Ranch. I was working for Todhunter & Devine and stayed there that summer tending to saddle horses. (R. 381.) I worked for them for ten years, and my home was south of Steen's Mountain at Whitehorse and Juniper. During the summer, in July, I went a time or two out to a mail box at Windy Point, where one or two neighbors lived, Ed Roberts, Burns and Stauffer outfit, and I went out to the mail box a time or two and that was the first time I saw Malheur Lake. The mail box was right near Windy Point, near the road that runs by way of Winnemucca, and the one that connected up with Canyon City. (R. 381–382.)

Mr. GEORGE H. BOLLENBAUGH, called as a witness for the plaintiff, testified in substance as follows:

I am 47 years of age, and my present occupation is that of a trapper.

I have lived in Harney Valley all of my life, since 1884; I was born here. (R. 1397.)

I first saw the lakes in 1889, when I was a small boy. At that time, my folks lived at Warm Springs on what is known at the present time as the Eph. Sizemore place, down on Harney Lake.

(Mr. PECORE. This place, which is located down on Harney Lake, can be identified on the map, Plaintiff's Exhibit No. 4, and the place is situated in the southwest quarter of Section 10, T. 27 S., R. 29 E. That is where the old stone house was. R. 1398.)

My folks continued to live down there about nineteen years. (R. 1398.)

I have worked around different places on the lakes, but I have not lived at any other place on the lake, except the Sizemore place. (R. 1399.)

Mr. JAMES M. BRANDON, called as a witness for the plaintiff, testified in substance as follows:

I am 63 years of age. At the present time I am working for Mr. Hanley here in Harney Valley.

I first came to Harney Valley in 1885, just passed through here going over to Happy Valley. Formerly I rode for the Island Ranch, the Pacific Livestock Company. (R. 960.)

Mr. MARTIN H. BRENTON, called as a witness for the defendant, testified in substance as follows:

I do not like to tell my age.

I was in Harney County before 1881 when the Sand Reef broke through. I was here the first time in 1878.

(At the present time I reside at Burns, Oregon.) (R. 2366.)

I have been interrogated by the counsel for the Government (before the trial); they got a statement from me last June or July. I have been in attendance in court here more or less since the trial commenced, and I was subpœnaed by the Government to attend here. (R. 2367.)

Mr. ARMSTEAD ELLSWORTH BROWN, called as a witness for the plaintiff, testified in substance as follows:

I am 67 years of age (and at the present time I reside at Princeton, Oregon).

I have lived in Harney Valley since July, 1884; not in the immediate valley but close around here in this country. (R. 2176.)

Mr. ROBERT HAMILTON BROWN, called as a witness for the plaintiff, testified in substance as follows:

I am 71 years of age and at the present time I reside in Snake River Valley near Nyssa, Oregon.

I first came to Harney Valley in 1885, (R. 1083) and I stayed here until 1918, then I moved down to Nyssa Valley. (R. 1084.)

Mr. JOSEPH WARREN BUCHANAN, called as a witness for the plaintiff, testified in substance as follows:

I am 71 years of age and at the present time I reside 27 miles east of Burns. I have been a stockman practically all of my life.

I first came to Harney Valley in 1885 and that is when I became acquainted with Malheur Lake. (R. 919–920.)

Mr. JAMES G. BUNYARD, called as a witness for the plaintiff, testified in substance as follows:

I am 43 years of age and I have lived in Harney County all my life.

In 1904 I and some other members of our family moved on the Griffin tract within the present (Lake Malheur) Bird Reserve, (R. 2161) and we were there for two or three days; I imagine it was in about July.

We then moved from there over onto the other side of the (Malheur) lake onto the land my father owned up until he died, which is also in the (Lake Malheur) Bird Reserve. It is known among the settlers as the Bunyard Ranch. It is the place where the Hill Boys now live.

(NOTE.—That is shown here (Plaintiff's Exhibit 3.) as the Hill Brothers Ranch, and it is just north of the north boundary of Lot 5, Section 34, T. 26 S., R. 31 E., south of the lake. Pecore, R. 2162.)

Mr. LEROY BUNYARD, called as a witness for the plaintiff, testified in substance as follows:

I am 53 years of age and I reside at the present time in Burns, Oregon.

I first came into Harney Valley in 1886. I have not lived continuously at Burns since then; my home is at Cow Creek. (R. 1146.) I have been down to Malheur Lake frequently. Practically the first time I saw Malheur Lake was in 1893. (R. 1147.)

Cross-examination:

I do not own any land down on the lake itself nor along the meander line. (R. 1167.)

Mr. LEE MINIS CALDWELL, called as a witness for the plaintiff, testified in substance as follows:

I am 68 years of age. I first came to Harney Valley in 1879, settling on Poison Creek, about six miles east of north of what is now the town of Burns. (R. 137.)

When old enough I engaged in work connected with ranching, and haying. I rode for Stenger and Devine & Todhunter and Jim Mahon and Tom Whiting. My work as a rider took me into the vicinity of Malheur and Harney Lakes.

I saw Harney Lake first time on June 20, 1879, when I came across from the OO Ranch; I could look down the ridge and see both

lakes. I did not go down to the lakes until the next February or March, to swamp cattle. (R. 138.)

Mrs. MYRTLE CALDWELL, called as a witness for the plaintiff, testified in substance as follows:

I have lived in Harney County since 1896.

I own a place down there in the vicinity of Malheur Lake.

(Mr. PECORE. As I understand it, Mrs. Caldwell has several places down there, Mr. Liljeqvist. The house in which she now lives is in Lot 2, of Section 33, Township 26 South, Range 31 East, south of the lake; she has another house in the northwest quarter of the northeast quarter of section 32, Township 26 South, Range 31 East, south of the lake; and she has an interest up in Township 26 South, Range 33 East, I believe.)

I used to have a place down there right straight north of the old Hughet place; it is now known as the Hill Boys place. I took possession of that property I think 25 years ago last February (1931), and I had charge of that property until the summer of 1918. (R. 2292.)

Mr. W. A. CAMPBELL, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. How long have you lived in Harney County?—A. I came here in June, '86.

Q. In June, 1886?—A. Yes.

Q. And have you lived here continuously ever since in this (R. 1969) part of Oregon?—A. Practically, yes.

Q. During the first few years that you were in this country, what business did you follow?

I am 74 years of age. I have lived in Harney Valley since 1885.

I am called "Red" about as much as anything else in this community; a lot of people do not know me by any other name than "Red". As far as I know when the witnesses speak of "Red" Campbell's place, they mean my place.

I have a place that I call mine down there within the (Lake Malheur) Bird Reserve; and within the (Neal) meander line.

I moved on to that place in 1893. There was a house already there and I got the house. I have no family.

I did not build any house there, it was there when I went there. (R. 1970.)

I was told that before I went there, the place was supposed to be that of a daughter of Cap. Waters who built the house.

I know a man by the name of Scott Haley; he came in there the same day that I did; he is a friend of mine. The house was on his place too, (when he went in there) and it was owned (R. 1971) previously by the daughter of Cap. Waters; she owned both places. (R. 1971.)

Mr. CLARENCE THOMAS CAREY, called as a witness for the plaintiff, testified in substance as follows:

I am 58 years old and reside in Jordan Valley.

I came to Harney Valley in 1883 and together with my folks stayed during the winter of 1883 at Egan, near what is now Burns. In the spring of 1884 we moved to Crane Creek. We lived at Crane Creek until 1924.

The first time I saw Malheur Lake was in 1884. (R. 760.)

Mr. J. L. CAREY, called as a witness for the plaintiff, testified in substance as follows:

I am 56 years of age and I am living at Lawen, Oregon. I first came to Harney County in 1883. (R. 794.)

Mr. FRANK CATTERSON, called as a witness for the plaintiff, testified in substance as follows:

I am 49 years old today and at the present time I reside with my family at Crane, Oregon. The first time I came to Harney County was in 1886 and we settled on a place near Malheur Lake in 1887; my mother lives there yet. (R. 1181.) The place is located about five or six miles west of Lawen. (R. 1181–1182.)

I do not remember exactly when I became familiar with that lake but it was in the late eighties, when I was a small boy. When I got older I went down to the lake from time to time handling stock mostly and riding for cattle; part of the time it was our own stock and part of the time I worked for the Pacific Livestock Company and Stauffer & Sweetser, known as the Circle Bar Outfit.

When I got to be about fifteen or sixteen years old I was down on the northeastern part of Malheur Lake about every year. (R. 1182.)

Mr. RALPH CATTERSON, called as a witness for the plaintiff, testified in substance as follows:

I am 44 years of age, and at the present time I live at the hot springs, this side of Crane, Oregon.

I was born here in Harney Valley and I have lived here all my life.

My family (my parents) had a place on the lake; it is in the meadow lands of our lake down there. It is patented land. When I was a boy it was known as the D. N. Catterson place. It is west of where Lawen is now. About a mile west and south of where the depot is at Lawen—the Lawen store. My folks told me they moved down there in the spring (of the year) I was born—that would be in 1887. I was raised up there on my father's place.

One place I own down by the lake I got in 1916 (R. 1705), and I have lived on it.

(NOTE.—The place he owns is in Lot 7, Section 22, T. 25 S., R. 32½ E. (Pecore. R. 1706.))

That is not the only place I own near the Neal meander line. I own another 160 acres east and north of there. It is in the name of Ralph and Minnie Catterson.

(NOTE.—That is in the west half of the northwest quarter and the north half of the southwest quarter of Section 14, T. 25 S., R. 32½ E. (Pecore. R. 1706.))

The place that I built a fence and extended it down into the Bird Reserve, is the one closest to the lake; the one I first mentioned (Ralph Catterson place); that is the one in Lot 7 (R. 1706), Section 22, T. 25 S., R. 32½ E.

One of them is known as the Noah Oard ranch, and the other the Charlie Oard ranch. (R. 1706.)

Mr. GEORGE W. CAWLFIELD, called as a witness for the plaintiff, testified in substance as follows:

I am 61 years of age, and reside at Burns, Oregon.

I have lived in Harney County since 1888; I have been here most of the time; was away probably one year. (R. 1907.) The first year I came here, in 1888, I was down to the (Malheur) lake hunting, but it was in 1893 when I settled there at Swan Lake, on the place that my brother Jeff has talked about here. I only heard part of his testimony. (R. 1908.)

Mrs. ISORA CAWLFIELD, called as a witness for the plaintiff, testified in substance as follows:

I have lived in Harney County ever since July, 1888. My maiden name was Simmons.

Mr. BLACKMAR. Q. Did you ever live near Lake Malheur?

A. Well, not what really is Lake Malheur. We lived there near the swamp.

Q. Near the swamp?—A. On the Simmons place.

I am the wife of Jeff Cawlfield, who has just testified in this case.

I think the Simmons house would be just about half a mile north of where Pete Caldwell now lives.

The Simmons house is in the northwest quarter of Section 33, T. 26 S., R. 31 E., south of the lake. (R. 1911.)

Mr. JEFF CAWLFIELD, called as a witness for the plaintiff, testified in substance as follows:

I will be 63 tomorrow, Friday the 13th (of November, 1931).

I was born in Olathe, Johnson County, Kansas.

I first came into Harney County in July, 1888, and in the fall of 1890, I went to Washington, and was gone until the spring of 1892, and I returned.

Our family formerly had some property near Malheur Lake. It took in Swan Lake, and it extended east and south, and my brother had a claim right due west of it. I think they settled there in the spring of 1892, which time that land was not surveyed.

Our family built a house down there. (R. 1882.)

I was with my father most of the time. I think they lived there the year round. I have worked out in the summer a good deal.

My father never filed on the land after it was surveyed. I think the Pacific Livestock Company owns it now. Venator did own it. He bought the improvements.

Mr. PECORE. Just east of Swan Lake, the south end of Swan lake.

A. The south end of Swan Lake. It runs to the north end of it, too, and the east, and back into the tules.

Mr. PECORE. R. K. Venator is shown as the patentee of Lots 11 and 12, of Section 3, Lot 2 of Section 10, Lots 12 and 13 of Section 4, and Lot 1 of Section 9, T. 25 S., R. 32 E. north of the lake. (R. 1883.)

There were improvements on my father's property, and they were sold to Mr. Venator before it was patented. (R. 1884.)

Mr. WILLIAM CAROL CECIL, called as a witness for the plaintiff, testified in substance as follows:

I am 84 years of age. I first came to Harney County in 1873. I came back here every year thereafter until I moved here in 1877, where I have lived ever since. (R. 234.)

Mr. EMANUEL M. CLARK, called as a witness for the plaintiff, testified in substance as follows:

I am 68 years of age, and was born in 1863.

I have lived in Harney County since 1883. During the time I have lived here I have lived around the lake considerably. I first started going down to the lakes in 1883, when I was working at the Island Ranch for Todhunter & Devine. (R. 1735.) My work took me from time to time down to the lakes. I worked for Todhunter & Devine for three years.

The closest I ever lived on a place near the (Malheur) lake was at the Sodhouse Ranch. I was around the (Malheur) lake this summer gathering cattle. (R. 1736.)

Mr. JOSEPH WILLIAM CLARK, called as a witness for the plaintiff, testified in substance as follows:

My age is 58 and I reside in Harney, Oregon.

I am the husband of Mrs. Clark who was just on the witness stand.

I first came into Harney Valley in 1886 or 1887 and I have resided here ever since.

The first few years I was here I engaged in stock raising and my work took me down to the lakes quite a bit. (R. 1022–1023.)

Mrs. JULIA ANN CLARK, called as a witness for the plaintiff, testified in substance as follows:

At the present time I reside on Rattlesnake Creek, just east of the town of Harney, Oregon.

I came to Harney Valley in 1885 and excepting for two years, 1894 and 1895, I have lived here continuously ever since. I first came to live in Harney Valley in 1885. (R. 1004.)

Dr. R. C. CLARK, called as a witness for the plaintiff, testified in substance as follows:

I reside at Eugene, Oregon, and I am professor of history at the University of Oregon.

I was educated at the University of Texas, specializing in history, and I went to the University of (R. 319) Wisconsin and took my Ph. D. degree there, and I have been teaching about thirty years, twenty-four years of which have been at the University of Oregon.

I have studied and written on the history of Oregon. I am joint author of a text used in the schools on the history of Oregon, and I have written a comprehensive history on the Willamette Valley in Oregon, and I have published several monographs on Oregon history. (R. 320.)

Mr. WILLIAM M. COLVIG, called as a witness for the plaintiff, testified in substance as follows:

I was born in Richmond, Rey County, Missouri, September 2, 1845, and my age is 86. I have been in the practice of law generally in my life, but I have retired.

We first came to the State of Oregon by ox teams and reached Portland on the 15th day of October, 1851. We came over what was known as the Oregon Trail; down the Columbia River to The Dalles. We have left our heavy wagons at Old Fort Hall on the Snake River and reached The Dalles with the lighter wagons and five oxen. Mother and eight children of us went down the Columbia on the steamer, the Old Fort Whitcomb, the first boat on the Willamette River.

In the spring of 1852 we went to southern Oregon, settling on a donation land claim one mile from Canyonville, Douglas County, Oregon, where I was raised from the age of seven until I enlisted in the Army in 1863. I became a member of Company C, First Regiment of Oregon Cavalry, during the Civil War (R. 397).

During my military enlistment I accompanied the Drew Expedition to the Owyhee country which left Fort Klamath on June 29, 1864; we came out through Drew's Valley named after my colonel, Charles S. Drew, and camped near the hot springs a mile or two south of Lakeview, but there were no white people in the country at that time; thence we went down the east (R. 398) side of Goose Lake, keeping pretty close to the lake at all times, to what is known as Lassen Pass, sometimes called Fandango Valley. (R. 398.) We camped in Goose Lake Valley. (R. 399.) We went up that little valley into the mountains, crossed over and came down into Surprise Valley, California; then turned a little to the north around three well-defined lakes in Surprise Valley; thence in the general direction of a lake called Guano Lake; we had made long marches through desert country. When we came to this lake, we found the water so bitter and strongly impregnated with alkali that we could not use it. Somewhere north of that lake we found good grass and water, prob-

ably along the south end of Warner's Valley, I think so now, but you must remember that everything did not bear a name in those days. When I see places on the map now I am not sure at all times that it is (R. 398) one of the places where I had formerly been sixty odd years ago, but from that lake where we found good water, we sent detachments out. It was reported to us the emigrants were trying to get over to the Idaho gold rush which was at its height in 1864; the Indians had attacked them at about Silver Lake; soldiers brought those families down to our camp in Goose Lake Valley. They were told a guard of soldiers would take them to Chico, California, but they refused to go and wanted to go along with us. The colonel told them we would be loitering north and south in various parts of this eastern country and it would be a long time before they reached Owyhee (R. 399) River, but they concluded to go with us. There were four families of women and children and two wounded men who rode in the ambulance wagon. (R. 399.)

On the 10th of August, 1864, we were in Warner's Valley where there were numerous lakes, some of them pretty good size and were known as Warner's Lakes. We went up one side and could not get around, so we went down south and found a way across Warner's Mountain facing a great desert leading out toward Steen's Mountain, but we skirted along the eastern edge of Warner's Mountain northward to a place called Pine Springs. The weather was exceedingly hot. Looking across the desert toward Steen's Mountain, we could not see anything except the dim outline of a small hill or mountain. We remained at Pine Springs and after dark sent two soldiers into the big black sagebrush country, then nearly as high as a horse, to find water, and if so, to signal us. We received the signal and the cavalcade immediately started across that 27 or 28 miles.

We had an odometer on the wagon wheel which recorded the number of the revolutions of the (R. 400) wheel each day. The wheel was 13½ feet in circumference and we knew the number of revolutions and by multiplying and dividing by 5,280 feet to a mile we got at the mileage. When we got across the desert, we found a very fine spring and good grass. The mountain is known to-day as Beatty's Mountain, and the springs as Crockett Springs. We laid up there some days. Then we made the next hitch for Steen's Mountain (R. 401) but before proceeding, we again sent out scouts who traveled in the night time. We got over to what pioneers here have told me is now called Skull Springs; we followed them to the springs; then we went southward and came to some more mountains known as Pueblo Mountains. They are right on the Nevada line. Then we went north. We camped some days at Trout Lake; then we came to what is known as Camp Alvord, there were no soldiers there, nothing except the remains of a camp called Alvord. We left part of the outfit there with the families that accompanied us and went on across the Alvord Desert, or they called it Alvord

Lake. It is about fourteen miles long and seven or eight miles wide. I have seen it when it was dry. It has dried up entirely and it is a white lane of alkali. I remember a crow lighting on it (R. 401) would look as large as a camel, and the most beautiful mirages were across that alkali flat. The lake was perfectly dry at that time. It was in August, 1864. We were at Pine Springs on the first day of August.

We left Camp Alvord and went to the Idaho country. Colonel Drew and some of us went on to Fort Boise, which was a regular old established military fort, or post, and then we returned and came back to Alvord, and from there on back to Klamath Falls.

In the spring of 1865, I accompanied another expedition that wandered around nearly all of the eastern part of Oregon (R. 403); it was known as Kelly's Expedition; it was to protect emigrants who were passing over the Humboldt Trail from California and to keep the Indians moving so that they would come in to make a treaty and consent to live on a Government reservation. The country between the lake country and Steen's Mountain was inhabited by what we called the Winnemucca Piutes, and there were more of these around Steen's Mountain and in this Malheur Lake country than there were in any other size country in northwestern Nevada, eastern Oregon or the Idaho country. I left for Klamath with this Kelly Expedition about the first day of May, 1865; we came out to the head of Sprague River, named after Captain Sprague and the first Oregon Infantry; then came out to the head of Goose Lake Valley, then through what was known as Summit Prairie on the mountains down on to Honey Creek and where the town of Plush is now situated. I did not keep any record of that expedition but we ran around there for some time on account of good forage. We first went south and came to Stone Bridge built by General Crook out of tons of stone from the hillsides and put across the Narrows to Warner Valley. (R. 404–405.) Finally, Kelly's Expedition came around the north end of Warner Valley.

Then we came over to Camp Alvord either by way of or north of the Steen's Mountain and around or through some path just south, but not on the same route that we traveled (there) in (R. 405) 1864. This was sometime along the latter part of October (1865) that we reached Camp Alvord; we established a camp on Wild Horse Creek, about six or eight miles south of old Camp Alvord. It is right under the summit of the highest part of Steen's Mountain. I remained there during the entire fall of 1865 until my time of three years' service in the army was about to expire. On the first day of March, 1866, I went to Fort Boise, and thence to Vancouver, Washington, where I was discharged from the army. (R. 405.) During the time we were at Camp Alvord, we knew there were lakes off here to the north which were undoubtedly these lakes (Malheur, Mud, and Harney Lakes). (R. 406.)

Mrs. FAY COMEGYS, called as a witness for the plaintiff, testified in substance as follows:

I am Mrs. Fay Olive Comegys, (R. 1408) and my maiden name was McKenzie; my father was Alexander McKenzie (R. 1408–1409). At the present time, I reside in Portland, Oregon. I first came into Harney Valley in 1889, and I left here last spring. When I first came in 1889 my father took up a place at what is known as the Hembree Bridge, on the Silvies River. We lived out there (at the Hembree Bridge) for two years and then we went (R. 1409) to the Narrows, where my father took up a homestead.

(SPECIAL MASTER. Can we locate the place where they lived on the Silvies River?

Mr. PECORE. No, sir.)

The place we lived on at the Hembree Bridge was close to the Island Ranch; I think it was straight across from the Island Ranch to the Silvies River. (R. 1410.)

My father's place at the Narrows, the Alexander McKenzie place, adjoins the Hembree place down there. (R. 1410.)

(NOTE.—We have a considerable area of land shown as being owned by Alexander McKenzie, but it is all shown as patented to other people, patented to Elliott, and Indemnity Lands to Oregon. The Alexander McKenzie homestead (at the Narrows) is situated in the east half of the southwest quarter and Lots 3 and 4, Section 23, T. 26 S., R. 31 E., north of the lake. (Pecore. R. 1411.)

Mr. FAY COMEGYS, called as a witness for the plaintiff, testified in substance as follows:

I am 54 years of age, and at the present time, I reside at Frenchglen, Oregon. I first came into Harney Valley in 1886 with my father and mother; my father then settled a couple of miles south of Rocky Ford on the Blitzen River, and we continued to live there about eight or nine years. (R. 1421.)

Mr. SIDNEY COMEGYS, called as a witness for the plaintiff, testified in substance as follows:

I am past 52 years of age, and at the present time I reside at Diamond, Oregon.

I first came into Harney Valley in 1886, and settled around Rock Ford.

I am a brother of the witness (Fay Comegys) who just testified.

Later I moved down to the Hill (Brothers) place, where we lived there off and on all during the nineties, the late nineties. I believe we moved down there in the spring of 1894.

We lived on that one particular place only a short time, about two or three years, and then I bought what is known as the Billy Dunn ranch now.

(NOTE.—The Billy Dunn ranch is where Billy Dunn lives now. That is in Lot 6, Section 34, T. 26 S., R. 31 E., south of the lake.)

The house is now quite three-quarters of a mile from the Neal line, south of it. I think the north line of the holding is right up close to the Neal meander line. Pecore. (R. 1444–1445.)

Mr. R. D. Cooper, called as a witness for the defendant, testified in substance as follows:

I am a civil engineer, having graduated from the Iowa State College in 1905. I have followed my profession ever since.

I have not held any official positions in my life to speak of. I have been rated as a field assistant out of the State Engineer's office (of Oregon) at various times for shorter or longer periods. I have not been on the State Engineer's force steadily at any time.

Mr. Liljeqvist. Do you accept this map as an accurate map of what they found?

Mr. Blackmar. Well, all I accepted was the manner in which his levels were run.

Mr. Liljeqvist. Well, I don't know. I would like to make (R. 2404) my proof.

Special Master. Very well. Go on. (R. 2405.)

Mr. Lloyd B. Culp, called as a witness for the plaintiff, testified in substance as follows:

I am 65 years of age and at the present time reside at Crane, Oregon.

I lived right north of the (Malheur) lake on some patented land.

Mr. Blackmar. Q. How far north of the (Neal) meander line did you live?

A. Well, I never did know just where that (the Neal) meander line was. It was right by my place, right along the road by my house, the original line.

Special Master. The old line?

A. The old line.

Special Master. The Meldrum?

A. Yes, sir.

My place embraces lots 1, 2, 3, 4, 7, and 8 of section 19, T. 25 S., R. 32½ E.; it is on that map (Plaintiff's Exhibit No. 3).

(Mr. Pecore. (Lots) 4, 7, and 8. Right by the Spurlock place.)

I have lived on that place about 16 years. (R. 1847.)

Mr. Chauncey Cummins, called as a witness for the plaintiff, testified in substance as follows:

I am 87 years of age and reside in Jordan Valley, Malheur County, Oregon.

I first came to Oregon in 1853. I was with the same outfit that Darius Hynson Smyth was with. I was nine years old at that time. I do not recall crossing the Blitzen River. All I can recall is that the lake was the first water we struck after we left the hills northeast of here; we camped there, and that seemed to be Malheur Lake.

I recall nothing that especially happened at that time, any more than we thought we were lost. (R. 489–490.) The older people had

to go out to talk about which side of the lake they would go on, and decided to go on the south side.

I do not know where we camped. I could not tell all of that.

I next returned to Harney County in 1872 and stayed over that winter and then went back to the Willamette Valley. During that winter I had a bunch of sheep and had them about three quarters of a mile from the town. I don't think I saw Malheur Lake that year. (R. 491.)

Mr. BLACKMAR. Q. As you passed Windy Point that time (1881—R. 492) did you seem to have any recollection of the events when you passed it before (in 1853)?

A. You know, I don't really know now whether (R. 493) it looked familiar to me or not.

I believe that 1881 was the first time I was there after 1873.

SPECIAL MASTER. Yes. And then you were 37 years of age.

I next returned to Harney Valley about 1887 and settled in Diamond Valley. (R. 493.) On my way to that valley I passed Windy Point, and I think the lake stood out from Windy Point at that time about from one-half mile to one mile, or something like that. (R. 494.)

Mr. JAMES M. DALTON, called as a witness for the plaintiff, testified in substance as follows:

I am past 70 years of age, and at the present time reside in Burns. I came here from Sheridan County, Missouri.

I came into Harney Valley in 1886 and settled on what is called The Island. It is about seven miles southeast of Burns on the Hanley Lane, or the road to The Narrows. (R. 608.) The road they call the Hanley Lane is the road that runs from Burns cut by Wright's Point to The Narrows. (R. 609.)

I don't remember exactly when I first went down to the lakes, but it must have been a year or two after I was here, about 1888, before I was close to the lakes; I was probably close enough from Wright's Mountain or Dog Mountain to observe both lakes, and that would be about five or six miles. 1888 was about the first time I went near the lakes to make any observation. At that time I was riding for stock; and it took me there to Malheur Lake for the first time.

I was not with any particular outfit then, just neighbors. The stock men would get together sometimes and ride the lakes, and gather up the stray cattle. That was in the vicinity of Lawen at that time. There were other times I have been around Malheur Lake shooting wild fowl; other times I canvassed the country, when I was in politics a little bit, and I canvassed it four different times. I have been clear around both lakes (Malheur and Harney Lakes), (R. 609) and I visited nearly every house and the people on the lake, and in the county. I traveled by team then. (R. 609–610.)

Cross-examination:

I was not down in Malheur Lake before the Sand Reef broke through. I came here in 1886. (R. 617.)

Mrs. Ollie Darsey, called as a witness for the plaintiff, testified in substance as follows:

I was born in 1874 and reside in Burns, Oregon, and together with my parents, came through Harney Valley the first time in October, 1880. I moved here with my folks into Harney County in May, 1882. (R. 645–646.) I was six years old when I came here. We went on the Island Ranch in 1882; we were two miles northwest of the Island Ranch (proper), what they call the old Chapman land. It belonged then to Todhunter & Devine, for whom my father was working at that time. We were about a mile and a half or two miles from the west prong of the Silvies River, on the island that is between the two prongs of the Silvies River. (R. 646.)

I have passed clear around Harney Lake in a car, but I never paid particular attention to it.

I have never crossed the Sand Reef. (R. 656.)

Mr. John G. Darsey, called as a witness for the plaintiff, testified in substance as follows:

I am 63 years of age.

At the present time I reside at Burns, Oregon. I have lived in Harney County since 1899.

I have never had a place down on Malheur Lake since I came here in 1899. I have been down to the (Malheur) lake from time to time, for the purpose of hunting mostly. (R. 1957.)

I have been (there) from 1902 to 1908. I think every spring and fall I hunted on the lake. (R. 1958.)

Mr. Charles E. Dillman, called as a witness for the plaintiff, testified in substance as follows:

I am 41 years of age and reside at the present time in Burns, Oregon.

I have lived in this community since 1909. I have had occasion to be near Malheur Lake from time to time. (R. 1860.)

Mr. Mott V. Dodge, called as a witness for the defendant, testified in substance as follows:

I am a civil engineer, a graduate of the Iowa State College in 1905, and since that time I have practiced my profession continuously until the present time.

I have held the position of water master of Harney County for a term of about four years; I do not believe I can give that year. I know I was the first water master of the county. I was county surveyor of Harney County I believe for six years, and since that time I have been engaged in the practice of my profession since I have graduated, and I am still practicing it. (R. 2371.)

I first came into Harney County in 1910, in the employ of Mr. C. B. McConnell. At that time Mr. McConnell was promoting some irrigation projects and various phases of development in Harney County, and I was working for him. In connection with that work

I did some engineering work down on Malheur Lake. At that time Mr. R. D. Cooper and I were working together as the firm of Cooper & Dodge, and we reported directly to Mr. McConnell; in the beginning we furnished the reports to Mr. McConnell himself. (R. 2372.)

Mr. JAMES J. DONEGAN, called as a witness for the plaintiff, testified in substance as follows:

I am 59 years of age and at the present time I am a land and tax agent. I have lived in Harney County since 1889 and continuously since 1893. (R. 1529.)

Mr. CLARENCE W. DRINKWATER, called as a witness for the plaintiff, testified in substance as follows:

I was born in September, 1878; I am 53 years of age. I came to live in Harney Valley in June, 1886, and I have lived here practically continuously ever since. (R. 1869–1870.)

I was pretty young at that time; when I was 17 years of age, along in 1896, I was in the mercantile business, clerking at Harney. I think the first year that I was down around Malheur Lake was in 1891 or 1892. I can not recall just exactly the year; the early nineties.

In 1901, I bought a squatter's right near Malheur Lake from Frank, or P. F. Heinz, I believe was his initials. (R. 1870.)

I think I can locate it on the map, (Plaintiff's Exhibit 3), if I can locate (R. 1870) Fred Otley's property. It is directly south of that. I don't think it is the Otley homestead. I think it is ground Otley purchased.

Mr. PECORE. The land apparently was inside the Neal meander line, south of Lots 7 and 9 of Section 21, Township 25 South, Range 32½ East. The north boundary of the land, as he described it, was apparently just about even with the southeast corner of Lot 7 of that Section 21.

The WITNESS. That just about describes the location correctly. This place was entirely below the meander line. (R. 1871.)

I have not been down there in the last few years. (R. 1870.)

Mr. BLACKMAR. There was some dispute about that as to (R. 1872) just where it was located.

SPECIAL MASTER. Yes, very well.

Mr. PECORE. As I understood from Mr. Vickers, the property you had was down where there is a shack now located, about a half mile east of the Heinz place, just west of the Ausmus house.

A. No, my place was in 32½, Range 32½.

Mr. PECORE. That is six miles east and west, but there is a shack down here south of Section 29, and Mr. Vickers, who lived over there in that country, told me that he thought the land you had covered the property that that shack is now on. It is over here south of Section 29, instead of south of Section 21, as Mr. Drinkwater described it.

A. The place I had was directly south of the Fred Otley property—not the Fred Otley homestead; there was a Fred Otley, Jr., and a Fred Otley, Sr.

It was south of an Otley tract; south of the Fred Otley, Sr., tract.

Mr. PECORE. Fred Otley is the present owner of Lot 1 of Section 29, Township 25 South, Range 32½ East, which is just north of this Ora Hayes tract as it is now known, on which that shack I spoke of is located.

A. Ora Hayes tract?

Mr. PECORE. Yes. (R. 1873.)

A. At the time I owned it the Scott Hayes tract was directly west, joined this tract that I owned on the west, and the Ora Hayes was what was then the Scott Hayes tract, I guess.

Mr. BLACKMAR. I think that gives us the location within reasonable limits. (R. 1874.)

I never did reside on that land. I worked at Lawen and I owned that tract from about 1901–1902 up to 1907. (R. 1874.)

Mrs. EFFIE L. DUNN, called as a witness for the plaintiff, testified in substance as follows:

I am the wife of Mr. William J. Dunn who has just preceded me as a witness.

I came here to Harney Valley with my parents, and brothers and sisters, in October, 1892; there were eight of us, some of them pretty small children. (R. 842.)

Mr. THOMAS T. DUNN, called as a witness for the plaintiff, testified in substance as follows:

I am 50 years of age and I have lived in Harney County ever since 1884 or 1888.

My father had a homestead on the (Blitzen) river about four miles south of Malheur Lake.

Between 1893 and 1896, somewhere, it was in the nineties, my mother moved on to the lake. (R. 1818.)

Mr. WILLIAM J. DUNN, called as a witness for the plaintiff, testified in substance as follows:

I am 67 years of age, and at the present time, I am living at the mouth of the Blitzen River, near Malheur Lake, on the old Jim Caldwell homestead. (NOTE.—The Old Jim Caldwell homestead is practically in the center of Secton 34, T. 26, S., R. 31 E., south of the lake.—Pecore. R. 817.)

That is over on the south side of Malheur Lake toward the west end.

I have been living there on that place for fifteen years, but I settled above there, on Section 15, T. 27 S., R. 31 E. when I first came to the country in 1885; that is about three miles above where I now live. Then I took up a homestead just west of the place that I am now residing on, and proved up on that; then I bought

this Caldwell homestead on which I am now living. I have lived continuously on Malheur Lake there since 1885. (R. 818.)

Mr. CORTIS E. ELLIOTT, called as a witness for the plaintiff, testified in substance as follows:

I am 53 years of age and at the present time I reside at Diamond, Oregon.

In 1890 I resided at the Narrows. My father had taken out a homestead there. We joined the Hembree property on the north; (R. 1042) that is at the Narrows. (R. 1043.)

Mr. HADDEN ELLIOTT, called as a witness for the plaintiff, testified in substance as follows:

I am 43 years of age, born in 1888 (at Burns, Oregon), and at the present time I live at Diamond, Oregon.

I have lived in Harney Valley all my life.

My father, (Henderson Elliott—R. 2222) formerly lived on what is known as the (A.) McKenzie place (near the Narrows—R. 2222). I do not remember when we moved there; I was a very small kid; I think I lived in that vicinity until (R. 2217) about 1916. I believe our family said they moved in there about 1891; I could not be certain about that.

SPECIAL MASTER. And you lived there from the time you were three years of age until you were 28, or 25 years. (R. 2218.)

I have seen Mr. Triska, when he was game warden down there (Lake Malheur Bird Reserve), traveling in that community with a canoe on the back of his motor cycle. I never made any trips with him. (R. 2221.)

Cross-examination:

I had a place down on Mud Lake; it was on deeded land. We got the place some time after 1900; he (my father) bought out a man named Ware, whom I think got the homestead.

Mr. LILJEQVIST. It is Lot 2, Section 32, Township 26 South, Range 31 East, north of the lake, the Elliott place.

Part of it was the old Ware place, part of it was not.

Mr. LILJEQVIST. Q. Where was the rest of the Ware place?

SPECIAL MASTER. The question is whether the Elliott place (R. 2226) embraces all the Ware place, or some more.

A. The Ware place would be up here [indicating on map].

Mr. LILJEQVIST. Easterly of the house.

A. Yes. (R. 2226.)

I think it was about a half a mile, but the whole of the Elliott place included the whole of the Ware place.

SPECIAL MASTER. And some more.

A. Old Man Ware had a place there, too. There was two Ware places, and maybe more. I don't know. There was quite a family of Wares. (R. 2227.)

Mr. JESSE FARRIER, called as a witness for the plaintiff, testified in substance as follows:

I am past 48 years of age.

I have been living here in Harney County off and on since 1900. (R. 1927.)

Mr. WILLIAM L. FINLEY, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. I desire to offer the deposition of William L. Finley in evidence, taken before Mary E. Bell, a Notary Public in and for the County of Multnomah, State of Oregon, on the 28th day of October, 1931, Wednesday, at the hour of 9.40 a. m.

SPECIAL MASTER. Have you any objection to any questions there?

Mr. LILJEQVIST. No, sir.

SPECIAL MASTER. Let it be admitted in evidence, and I will read it at my leisure.

Mr. LILJEQVIST. I suppose it should be copied into this record to make it clear.

Mr. BLACKMAR. Probably it would be more convenient if the reporter copied it right into the record.

SPECIAL MASTER. Yes. (R. 2295.)

At the present time I reside at Jennings Lodge, Oregon.

I am a naturalist, writer, author, and lecturer.

For many years I have been a member of certain societies of the United States which have as one of their objects the study of wild life and game.

At present, I am with the American Nature Association, Nature Magazine, Washington, D. C.; for many years I have been connected also with the National Association of Audubon Societies for the conservation of wild bird and animal life; also for 20 years President of the Oregon Audubon Society. I was State Game Warden of Oregon for (R. 2297) four years, 1911 to 1915; and State Biologist of Oregon for four years, 1915 to 1919.

I was appointed by the Secretary of Agriculture as a member of the Advisory Board of the Migratory Bird Treaty Act; I have been a member since its establishment, and I am now a member of that body. They meet to advise concerning Federal laws for (R. 2297) the protection of wild birds, migratory birds.

Of course, I am a member of different organizations, the Cooper Club, the Ameri an Ornithologist Union.

Practically my entire life since I graduated from the University of California in 1903 has been devoted to the studying of bird and animal life, photographing and writing.

In the course of the next thirty days, I expect to be absent from the State of Oregon; I go on a regular eastern lecture tour. (R. 2298.)

Mr. MAURICE FITZGERALD, called as a witness for the plaintiff, testified in substance as follows:

I am past 68 years of age, and at the present time reside at Ross, California.

I came into Harney Valley July 16, 1873, with a detachment of soldiers from the Fort Klamath country. I came into Harney Valley by way of Warner Lake, Mule Springs, and the Hot Springs, now known as the OO Ranch, and to Wright's Point. (R. 1774.)

We camped at Silver Creek, where the water was only in pools on the lower part, so that the troops had no trouble at all in crossing it.

We then came over some rolling hills until we came down to what is known as King Bolt Hill, and then what is known as Weaver Springs to Wright's Point through a sagebrush country.

We camped on the west fork of Silvies River, which had running water in it at that time; there was no bridge there but the troops did not have any trouble crossing at that point. It was not necessary at that time to swim the horses.

We did not cross over Wright's Point; we came around the Point.

We camped, as I said, on the west fork (of the Silvies River) that night; next day we crossed through what is known as the Island and crossed at a ford on the east fork of the Silvies River and (R. 1776) then on up through the valley to Camp Harney. (R. 1777.)

The Island Ranch was about 300 yards north of where we camped on the fork of the Silvies River. There was at that time a small cabin occupied by the Venator family; that was the only residence that I saw on that whole journey.

I think there were three companies or troops of cavalry with our outfit on that occasion. We had a wagon train, some wagons and some pack animals, too. We had the usual equipment for cavalry. All those companies had a blacksmithing and shoeing outfit. I presume we had our wagon train loaded with provisions; we had provisions I know but I do not know how much. We did not have an ambulance. (R. 1777.)

From that date, July 16, 1873, I took up more or less of a permanent residence in Harney County, for a good many years. I was gone about two months to Walla Walla, and then returned.

The next time I saw Malheur Lake down there was in the spring of 1874. We went down on a Sunday; I think three of us went down to see the hot springs, which we had heard about and were curious to see. At that time we saw the lake there plainly. We went pretty close to the northeast corner of what was known as Malheur Lake.

I do not think I was more than half or three-quarters of a mile perhaps from Saddle Butte when I saw the lake; I do not know the exact distance now. (R. 1779.)

In the fall of 1874 I spent the greater part of a day with about forty soldiers hunting antelope within, at times, half a mile of Malheur Lake, on the northeast side, in the vicinity (R. 1780) of what is known as Saddle Butte. It was not exactly the same place that I was at before, but a little west. When I saw it before I was at the east side of what is known as Malheur Slough; and in the fall at the time we were hunting antelope, I was mostly on the west side

of that slough, which passes on the east side of Saddle Butte before it enters the (Malheur) lake. We had horses, and took one 6-mule wagon to carry the carcasses back to the fort. (R. 1780.)

About June 1, 1876, I went down to the (Malheur) lake, with Captain (later Major) Bendire, and one or two other men, for the purpose of gettings eggs of some waterfowl; I do not know exactly what kind of waterfowl from which we were to get eggs.

Captain Bendire was commander of my company—and troop. Later he retired, moved to Washington, and was appointed curator of the National Museum. (R. 1781.)

I was discharged from the army on the 15th of June, 1877, and then I took up my permanent residence in this county. Myself and another fellow put our funds together and bought 130 or 140 head of cattle which we brought into the valley in the summer of 1877. I continued in the cattle business from that time until the fall of 1882. My work with those cattle took me down in and around Malheur Lake; at times frequently I was down around there. (R. 1784.)

I had a mail contract in 1880, 1881, and I think 1882 (R. 1786), but I only carried the mail personally in 1881. In 1881 I carried the mail for about seven months, every day, from Harney to Anderson Valley, and back the next day, passing by Windy Point. I carried the mail mostly in the fall and all through the winter until the latter part of April, I think, that year. I started at Camp Harney and took as direct a route there as was known; we passed through Nine Mile Slough, went through kind of a sagebrush country with occasional patches of rye grass and other kinds of grass, and sagebrush between, down to Malheur Slough; then we crossed Malheur Slough, and went straight on (R. 1786) to Windy Point. It was pretty near a perfectly straight road on to Windy Point, and then from Windy Point on to Anderson Valley. (R. 1787.)

I have been around Harney Lake. (R. 1792.)

Mr. GEORGE FRY, called as a witness for the plaintiff, testified in substance as follows:

I am 68 years of age, and reside at the present time in Burns, Oregon.

I have lived in Harney Valley since the spring of 1885. When I first came here, I worked for Peter French and drove a stage. I had a preemption on the Blitzen River 15 miles from Malheur Lake. (R. 1123.)

Mr. JOHN GARDNER, called as a witness for the plaintiff, testified in substance as follows:

I am 77 years of age, and my address is Burns, Oregon. I was born in Chillicothe, Livingston County, Missouri. I first came to

Oregon in 1871. (R. 264.) I came with a herding outfit across the plains; we came to Grand Ronde first.

I went into the Army in 1876. I was in Company A, Walla Walla, First Regiment, First Company Cavalry. I got out of the Army in 1878 (R. 265) or in 1879 or thereabouts (R. 288–289) and came to Harney Valley in June of that year, while still in the Army. We came to Fort Walla Walla and then they sent us down here. Fitzgerald came after us. Then I got out of the Army and came back here a year or two afterwards, about 1883, and I have been here off and on ever since.

Since I have been here, I have worked for Todhunter & Devine, Tom Overfelt and (R. 265) Huck Mason.

I saw Malheur Lake for the first time in June, 1878. We watered our horses there and stopped for half an hour, then went on. (R. 266.)

Mr. JAMES HENRY GIBSON, called as a witness for the plaintiff, testified in substance as follows:

I am 73 years of age and my residence is on the south side of Malheur Lake.

I came to Harney County the forepart of June, 1883; I have been here off and on ever since. I followed the general occupation of farming. (R. 1169.)

Mr. JOHN EMERY GRAVES, called as a witness for the plaintiff, testified in substance as follows:

I am 61 years of age, born in 1870.

I am the man who has been referred to here from time to time as "Doc." Graves; my friends call me "Doc."

I first came to Harney County in 1900, and I have been here ever since, (R. 2099) except I have been out of the country a little while, probably six months at a time, over to Lake County to school. I formerly taught school over in that county.

I am the brother of Sam Graves, who is now dead. (R. 2100.)

Mrs. MARY GRIFFIN, called as a witness for the plaintiff, testified in substance as follows:

I came to Harney County in 1891. At the present time, I am Superintendent of Harney County schools, and I have held that position for almost twelve years. (R. 1931.)

I formerly lived down there at Malheur Lake; my husband had a homestead on the north side of the lake; it was known as the Gerald Griffin homestead.

(NOTE.—Plaintiff's Exhibit No. 3, shows that Lots 1, 2, and 6, and the south half of the northeast quarter of Section 13, T. 26 S., R. 31 E. was patented to Gerald Griffin August 5, 1898.—Pecore. R. 1931–1932.)

Mr. FRED HAINES, called as a witness for the plaintiff, testified in substance as follows:

I am 67 years of age and at the present time reside at Harney, Oregon.

I have lived in Harney Valley since 1887, and at that time, I settled down in the Lawen neighborhood for a couple of years; then I moved to Harney in 1889. (R. 1518.)

The mercantile business that I presided over was established at Harney, Oregon, 15 miles from here (Burns, Oregon). (R. 1521.)

Mr. W. SCOTT HALEY, called as a witness for the plaintiff, testified in substance as follows:

I will be 71 years of age on April 2, 1932.

I have lived in Harney County since July, 1886.

I first went down to Malheur Lake in August, 1893, to locate there.

I located on lines established on the Neal (meander line) survey. If it was surveyed, it would be in two sections, 20 and 21. (R. 1987.) I guess there is close to 400 acres in the field that I have. (R. 1988.)

Mr. LESTER MARION HAMILTON, called as a witness for the plaintiff, testified in substance as follows:

I am fifty years of age, and reside about three miles east of Burns, Oregon.

I have lived in Harney Valley since 1893. I lived down near the Narrows from the beginning of the early part of January, 1894, to May, 1897. (R. 624.)

Mr. WILLIAM HANLEY, called as a witness for the plaintiff, testified in substance as follows:

I reside at the Bell A Ranch near Burns, Oregon.

At the present time, I am a member of the State Highway Commission of Oregon.

I first came into Harney Valley in 1879 and I was pretty well of a boy at that time. I have not lived here ever since then; I was a native of Rogue River Valley in southern Oregon. Father and mother were married at Roseburg, Oregon.

When I first came into the country, and since then, I have been engaged in the cattle business. (R.1348.)

Our first drive into their country was a combination drive with 800 or 900 cattle; the neighbors who joined us up by the old Hanley stock ranch in southern Oregon were Carlton, Bradley, and Charlie Jones. I adopted this country in 1879 when I first came into it. My father thought a boy ought to go out and hunt up his own country pretty early, so after quitting school, I put in my entire time around the old ranches in southern Oregon looking after big teams and attending to the general duties on places that my father

was operating. I was raised a kind of a second boss to him. His idea was that the people were getting too thick in that Rogue River Valley at that time and he started us out for ourselves. I had been over to the Klamath country a good many times before with him so that we knew that country and the Klamath people; we knew about the Goose Lake country, and we also knew about Silver Lake; in fact my father pioneered in (R.1349) grain (R.1350) raising. When he left me on top of the Cascade Mountains, he said to me, "Go until you find a big valley, but just remember one thing, you will not get much bigger than the country you will find," so I started out. I think he pulled his horse up and came back to me and said, "My son, if your luck goes bad, look around and find your own bad management, and the chance is your luck will get better." That was my start. I really thought that was a pretty good policy to follow all my life.

At the present time I own the Bell A Ranch, and also the OO Ranch in Harney County.

There were no ranches in this country when we first came in; no fences, and nothing. The country was entirely an open country. No ownership of land and no title to the land. I think the first land that was titled in this country was in 1885, or maybe 1887. There was only just a little post or two before the settlers came in.

The OO Ranch is one of the very early ones. Harden & Riley bought the OO Ranch and there were people on it before that time. (R.1350–1351.) A man by the name of Dick Dunn was down toward the OO, or there was somebody there whom Ike Foster bought out. Foster came up from Texas with Colonel Harden driving cattle, and he was with him a good many years in the Quinn River country; this Colonel Harden and Amos Riley sent him (Foster) into the country and he landed at the OO Ranch and bought the settler out. (R.1351.)

Upon the passage of the California fence law, Devine brought cattle up into this valley from California. Later, Todhunter was selected by him as his partner (and the firm then became Todhunter & Devine). For the same reason, Peter French was selected by Dr. Glenn to come into this country, and those two constituted the firm of French-Glenn. (R. 1351.) When I came into Harney Valley, in the early days, my cattle operations took me down around Malheur and Harney Lakes a good deal. (R. 1352.)

Mr. BLACKMAR. Q. Colonel Hanley, you have written a book (entitled "Feelin' Fine") in connection with your experiences here in this county, have you not?

A. Well, I was down in the hospital in Arizona, and I think the book kind of written me. If I had stayed there another month under that dietician woman, which is a Latin word, and which has been worked out through education, and means a poor cook, if I had been with her another month I could have written a good book.

Q. That is the book you have there, is it?

A. Yes. I will just present it to the court. (R. 1365.)

Cross-examination.

I am quite familiar with Harney Lake. (R. 1385.)

Mr. MARCELLUS B. HAYES, called as a witness for the plaintiff, testified in substance as follows:

I am 67 years of age, and I first came to Harney County in 1887. I have been here continuously ever since, except that I may have been out of here a few times, but I have made this place my home all the time.

The year that I came to the country, I came around the east side of Malheur Lake, and I have been (R. 1195) familiar with the conditions there (on Malheur Lake) pretty much ever since (R. 1196).

Mrs. MARCELLUS B. HAYES, called as a witness for the plaintiff, testified in substance as follows:

My name is Mary Isabelle Hayes. I was born in Linn County, Oregon, February 1, 1874. I first came to Harney County on June 6, 1885, and our family settled three or three and a half miles west of Harney City on Soldier Creek. (R. 1238–1239.)

Mr. JOHN J. HEINZ, called as a witness for the plaintiff, testified in substance as follows:

I will be 78 next April, 1932. I have lived in Harney County since 1891.

I lived there around Malheur Lake since 1891. (R. 1679.)

Mr. JOHN W. HEINZ, called as a witness for the plaintiff, testified in substance as follows:

I am 54 years of age. I have lived in Harney County since 1891, when I came here, or I think that was when I came into this country.

I am the son of J. J. Heinz.

I have lived in the neighborhood of Malheur Lake since I came here. (R. 1937.)

Mr. GUY L. HEMBREE, called as a witness for the plaintiff, testified in substance as follows:

I am 53 years of age, and at the present time reside at Klamath Falls, Oregon. When I first came to Harney Valley in 1886 I lived for a while out there on Poison Creek (near Burns, Oregon).

In the fall of 1890 we moved to the Narrows and lived there about nine years.

I am a brother of John L. Hembree, who testified here a couple of days ago.

We lived at what is known as the Narrows. (R. 1334.)

I lived down there at the time Mr. Ware did. (R. 1335.)

Mr. JOHN L. HEMBREE, called as a witness for the plaintiff, testified in substance as follows:

I am 55 years of age, and at the present time reside at Grants Pass, Oregon.

Together with my folks we came to Harney Valley in 1889 and settled at the Narrows where my father obtained some patented land; then he built a house on it. We lived there for several years; then eventually I left there and went to work in about 1901. (R. 881–882.)

(NOTE.—The Hembree Homestead is located in Lots 5, 6, and 11 of Section 25, and Lots 3, 4, and 5 of Section 26, T. 26 S., R. 30 E., south of Malheur Lake.—Pecore.—R. 882.)

After I left there in 1901 I went to Portland, but from time to time I have been back to the old homestead so that my knowledge of the lakes continues up to the past ten years; prior to that time I visited back and forth at different times; just about ten years I was absent, but up until a year ago in November I was here—I will put it that way.

The homestead was right there at the Narrows as Malheur Lake comes into there.

My father followed the stock business for four or five years; then we had what we call a general country store, (R. 882) at the Narrows for five or six years; then it was a combination business, we kept it as a hotel and catered to the general travel, so that it was a combined hotel and store business. (R. 883.)

Dr. LLEWELLYN EUGENE HIBBARD, called as a witness for the plaintiff, testified in substance as follows:

I am 68 years of age and I have been living in the vicinity of Burns, Oregon, for 31 years. I am a dentist by profession.

My purpose in coming to Harney County was to regain my health. I had my home in Portland, and I came to this country and was tenting out when I first came to Burns.

Commencing in the spring of 1899 I lived that entire year in a tent in various places; I was outfitted at La Grande, Oregon, and I drove a team with my outfit, and another young man from that place here; then I was up in Steen's Mountain; then back here to Burns, and I put in the summer of 1899 that way. (R. 1591.)

Mr. BLACKMAR. Q. Shortly after that time did you come to live near Lake Malheur?

A. That very season. I had regained my health. I lost the cough that was bothering me, and I went right back to Portland, and got my family, and came that fall, and established my residence here in Burns, and I have lived here ever since.

I have always been interested in birds. I have studied them all my life, not in school or in college, I never studied ornithology, but it was outside of school life that I made a study of the birds. My

interest was as a child growing up on a farm, I became extensively interested in birds, and as lots of boys have done, I made a collection of eggs in the Willamette Valley where I was born, and from then on I paid a good deal of attention to it. Then I was ill for quite a while, and for two years I tented outside, most of that time I put in my time studying wild life, and interesting myself in it. I have pursued the study of birds and wild life as a hobby. I think I got my greatest vision, or idea of the value of wild life that very season when I came to (R. 1592) this country (in 1899). Living in the city, and not having an opportunity to be as much as I wished with that sort of thing, and taking my vacation with people from the city, I, with a great many others, got a very great delight in going out with the wild things, and when I came to this country, and got a vision of the wild life here, and the myriads there was of it at that time, it gave me a vision of what the people should have an opportunity to see, and how it would interest them if they could see how I saw it that time here; I am referring to people in general; and I had a vision from that time of this thing being approached so that people whom I felt would be interested should have an opportunity to see these things that existed in this country.

I mean to see that the birds should remain. I had no thought or knowledge that this (Malheur, Mud and Harney Lakes) would be made a Bird Reserve at that time.

During my life I have read and studied scientific works on bird life and wild life, including such publications which from time to time the Government issues.

In this particular locality I have collected and studied birds and their habits. (R. 1593–1594.)

I have been on practically every part of Malheur Lake. (R. 1601.)

Mr. LYLE B. HILL, called as a witness for the plaintiff, testified in substance as follows:

I am 36 years of age and I have lived in Harney County for 32 years. At the present time I live on the south side of Malheur Lake.

(NOTE.—Mr. Hill's place is shown on the map (Plaintiff's Exhibit 3), as "Hill Brothers Ranch," just north of the north boundary of Lot 5, Section 34, Township 26 South, Range 31 East, south of the lake.—Pecore. R. 2141.)

On the place where I now live (the Hill Brothers Ranch) I have only been residing there for three or four years.

We have improvements there which consist of barns, sheds, and fences. (R. 2141.)

We also have another place around there within the (Lake Malhour) Bird Reserve. We have a place that we got from Star Buckland. I think we got that in 1924, and we lived there about four years; then we moved onto this other place (the Hill Brothers Ranch).

Prior to 1924 we lived on the eastern end of Malheur Lake, on my father's homestead, which was patented.

Mr. BLACKMAR. Let us have the location of that second place, Mr. Pecore. It is the Buckland place we are talking about.

Mr. PECORE. It is designated on this map (Plaintiff's Exhibit 3) as "Hill Brothers." The house is a little more than a mile north, and a little east of the Neal meander corner of Sections 27 and 28, Township 26 South, Range 31 East, south of the lake. (R. 2142.)

There was a house on the Buckland property when we bought it, and a fence. (R. 2142.)

Mr. ORA WINFIELD HILL, called as a witness for the plaintiff, testified in substance as follows:

I am 48 years of age, born in 1883, and at the present time I am living in Diamond Valley, Oregon.

I have lived in Harney County since 1891. (R. 1537.)

Mr. MARION HORTON, called as a witness for the plaintiff, testified in substance as follows:

I am 61 years of age, and at the present time reside at Diamond, Oregon.

I first came to Harney Valley in 1885. (R. 1469.)

In the early days, when I was here, I was a buckaroo, and I rode with the French outfit for whom I worked about 12 years. (R. 1472.)

Mr. THOMAS GEORGE HOWSER, called as a witness for the plaintiff, testified in substance as follows:

I am sixty years old; now reside a mile this side of a little town called Harney, fourteen miles from Burns, Oregon.

I first came to Harney Valley in 1876. The family stayed over one winter up near the upper Silvies Bridge; then we lived for a number of years this side and a short distance from the flour mills. (R. 212.)

I was five years old when I came into the Valley. My first employment was riding for my father. He had cattle at that time. Later, I rode for the P. L. S. Co., and my headquarters were at the Island Ranch, near Wright's Point.

While I was working for my father, I went down to gather cattle in the fall at the lakes. (R. 213.) In those days we just turned the cattle loose and let them wander; then in the fall we would go down and get them.

The best grass in the country was down near the lakes and the cattle naturally drifted down there. The cattle also drifted to the lakes, as Malheur Lake froze up, so that they could get from one island to the other; they drifted in all through the country where there were tules and grass. (R. 214.)

I continued to ride more or less all the time in the country near the lakes between 1890 and 1900. (R. 217.)

Mr. WILLIAM DAVID HUFFMAN, called as a witness for the plaintiff, testified in substance as follows:

I am 68 years of age and at the present time I reside at Andrews, Oregon, in the south end of Harney County.

I came to Harney Valley in August, 1888. I am engaged in the stock business, and have a few cattle. (R. 1573.)

Mr. RUBIN T. HUGHET, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Judge, how old a man are you?

A. 71.

I have lived in Harney Valley since June 1, 1885. (R. 2179.)

During the year 1885 I filed a preemption and located on the east side of the Blitzen River near the Rocky Ford; and after I made the final proof on that and disposed of it, I lived down in the vicinity of the Sodhouse, most of the time on a place known as the Sarah E. Marshall place, where the Hill Brothers now live.

I had a cabin out on that same tract of land now owned by (Mr. Thomas T.) Ted Dunn, and lived there for a while, one summer, and I am quite familiar with that tract of land. (R. 2186.)

Probably June of 1887 or possibly 1888 I made my first trip to Harney Lake to satisfy my curiosity; I had heard a good deal about Harney Lake, and I went down there to see it. (R. 2189–2190.)

Mr. ROBERT IRVING, called as a witness for the plaintiff, testified in substance as follows:

I am 74 years of age and reside at Crane, Oregon.

I first came into Harney County in 1878 during the Indian War, but I did not continue to live here. I went to Grand Ronde and returned here in 1884. (R. 431.) I first saw Malheur Lake off at a distance in 1878, but I was not down there. You could see it on some knolls a long way off but you could not tell how far it was.

Mr. BLACKMAR. Q. You could not tell how much water was in it that distance off?

A. No, sir.

Q. Out in this country sometimes there are mirages that make it look like there is more water than there really is.

A. Yes.

When I returned in 1884, I had stock and my home was out at what they called Crow Camp on the northeast end of the valley, about thirty-five miles a little north of east from Burns. (R. 432.) That is up towards what they call the Stinking Water Mountains. We lived about 12 or 14 miles from Stinking Water Creek. We were about 14 miles north of Crane. My work with the cattle took me mostly around Malheur Lake and not much around Harney Lake. (R. 433.)

Cross-examination:

I have never owned any land around Malheur Lake or inside of the lake. (R. 444.)

Mr. JOHN R. JACKSON, called as a witness for the plaintiff, testified in substance as follows:

I am 68 years of age, and at the present time I am living at Crane, Oregon.

I first came to Harney Valley 43 years ago, about 1888. At that time I went to work down at the Island Ranch, farming, as a laborer.

I have been down Harney and Malheur Lake the last few years; herded sheep there three years ago; and stock a year ago last summer. (R. 620.)

When I first came into the country, I did not go down to the main lake (Malheur Lake). I was on the Island Ranch. (R. 621.)

I do not know anything about that country up by the Sand Reef and Harney Lake. (R. 623.)

Mr. GEORGE L. JAMES, called as a witness for the plaintiff, testified in substance as follows:

I am 58 years of age, and at the present time I live in Harney, Oregon. I have lived in Harney Valley since 1884, except for one year, 1885.

I was around Malheur Lake for the first time in the winter of 1889 and 1890. I also remember an occasion of being down there about August, 1901 or 1902. (R. 1809.)

Mr. JOHN R. JENKINS, called as a witness for the plaintiff, testified in substance as follows:

I am 66 years of age, and at the present time I live in Diamond Valley, Oregon. I have been around in Harney Valley in here for 45 or 46 years since I came to the county.

During that time I have been around both Malheur and Harney Lakes.

I never did own a place down there near the (Malheur) lake. (R. 1812.)

Mr. LOUIE T. JESSUP, called as a witness for the plaintiff, testified in substance as follows:

I am 42 years of age, and my profession is that of a civil engineer. My residence address is Yakima, Washington.

In 1913 I graduated from the University of Idaho with the degree of B. S. C. E. (R. 2423–2424.)

I am an employee of the Division of Agricultural Engineering, United States Department of Agriculture.

My entire experience has been in the Government service, and I have had to do with irrigation and drainage and flood control (R. 2423) problems for investigations, reports and research work. My work has been in the Western States entirely.

Incidental to that work it has been necessary for me to make a study of soil and plants and, to some extent, trees; not to a very great extent with respect to trees.

I have done hydrographic work which includes a study of streams, their run-off, their gradient, the volume of water, and also the climatic conditions which affect the stream flow. (R. 2424.)

Mr. STANLEY G. JEWETT, called as a witness for the plaintiff, testified in substance as follows:

I am 46 years of age, and at the present time I reside at Portland, Oregon. I am employed by the Department of Agriculture, Bureau of Biological Survey, and I am in charge of predatory animal and rodent control for the State of Oregon. I have been with the Bureau of Biological Survey since 1910. Since I was a boy I have been interested in wild life; I have studied birds and their habits, and animals and their habits.

In my present profession it is necessary to keep up with the latest bulletins and books upon that subject. (R. 1992–1993.)

Cross-examination:

I was not working with the Department of Agriculture in 1908. (R. 2006.)

Mr. CHARLES SUMNER JOHNSON, called as a witness for the plaintiff, testified in substance as follows:

I was born on October 20, 1854, and I am now 77 years of age. I first came to Harney Valley in 1887. (R. 1249.)

Mr. JOSEPH KADO, called as a witness for the plaintiff, testified in substance as follows:

I am 69 years of age and I reside near Voltage, Oregon, south of Malheur Lake.

I have lived in Harney County since 1904. I own a place down near the Springer Place, near Malheur Lake, which I have lived on since 1919. (R. 2047.)

(NOTE.—Mr. Kado's place is just about the north boundary of Lot 1, Section 36, T. 26 S., R. 31 E., south of the lake.—Pecore. R. 2048.)

I first moved in there in 1919. (R. 2048.)

Cross-examination:

There is about a mile, I cannot say exactly, of my land on the Neal Meander Line. (R. 2049.)

Mr. Benson did not have a boat house right there (near my place) in 1922; the boat he (Benson) has got at the present time I do not remember (where it is); I don't think he had it at that time (1922).

Mr. LILJEQVIST. Q. Is Benson's land on the lake or on the (Blitzen) river where he keeps his boat house?

A. It is on the river.

I did not know so very much about the conditions (that existed at my place) before 1919.

The house that I have now was not built before I went in there (on my place). There was no house there at all (when I went there). (R. 2050.)

Mr. LILJEQVIST. Q. Let's get this phase of it straight, then. Mr. Springer thought that this house over in this picture was your house, Plaintiff's Exhibit 37.

Mr. SPRINGER. George Marshall's.

Mr. LILJEQVIST. The George Marshall house. Did you buy any house from George Marshall?—A. No, sir.

Q. This wasn't the Kado house at all?

Mr. SPRINGER. It has been the same place, but a different house.

Mr. LILJEQVIST. I see. That is all right. (R. 2050.)

Mr. CAMPBELL C. KILBURN, called as a witness for the plaintiff, testified in substance as follows:

I am 69 years old, born October 25, 1862 in Grundy County, Missouri. I reside in Malheur County, Oregon, but I am in the employ of the Pacific Livestock Company at the present time.

I first came to Harney Valley on June 6, 1882, and my headquarters then were at the Island Ranch, the same ranch that I am in charge of at the present time. (R. 729.)

Cross-examination:

I was not around the Narrows very much. (R. 743.)

Mr. WILL Y. KING, called at a witness for the plaintiff, testified in substance as follows:

I am 72 years old and I am County Treasurer of Harney County at the present time.

I first came into Harney Valley in 1879 with my parents, and we settled at Harney Valley in the Steen's Mountain. (R. 300.) I first began to ride in the fall of 1879 to gather cattle and continued to do so for nine years. I rode for the Smyth outfit from Happy Valley. (R. 303.)

Mr. SIMON LEWIS, called as a witness for the plaintiff, testified in substance as follows:

I am 78 years of age and I live in Burns, Oregon.

I came through Harney Valley in the fall of 1882 and I came to live in that valley in 1891. I first came in here with cattle and I followed the cattle business (R. 779) for quite a number of years until I came to live at Burns. (R. 780.)

Formerly I held the position of Treasurer of Harney County for a couple of years. In 1892 and 1893 I was Road Supervisor of Harney County for the north side of Malheur Lake; there was another man on the south side. (R. 780.)

Mr. JOHN EDWARD LOGGAN, called as a witness for the plaintiff, testified in substance as follows:

I am past 61 years of age, and my residence is Burns, Oregon.

I first came into Harney Valley in 1885. It has been my home; there were seven or eight years when I was not right in the valley;

later years in the mines. I have always considered it my home. When I first came into this country, when I was a boy, my father had a farm, and he was in the mercantile business (R. 1474), and his store was at Harney near where the old Post (Fort Harney) was located.

During all these years, from time to time, I have been to the lakes for numerous purposes. (R. 1475.)

Mr. MARTIN ANDERSON LUCAS, called as a witness for the plaintiff, testified in substance as follows:

I was born in County Tyrone, Ireland, in 1843, and the first of next month (December, 1931) I will be 88. I make my home at Dayville, Oregon, on the John Day highway.

I came to this country when I was ten years old, and first to Boston, Massachusetts; two years after I moved to Woodstock, Vermont (R. 413), and started to learn the harness trade. (R. 414.)

In 1867 I was in the Army, the 21st Infantry. When we came to the Western States, we came to San Francisco, stayed at the Presidio for about three weeks, then went to Vancouver, Washington; from there my company was ordered to a fort on Puget Sound where we remained for a year. Then we returned to Vancouver and from Vancouver we came up to Camp Watson in Grant Valley, where I was discharged on the 15th day of September, 1867.

On September 20, 1867, I was ordered to Camp Harney in Harney Valley to work for the Government as a carpenter at the Quartermaster's Department (R. 417), and I arrived at Camp Harney in 1867. (R. 413–414.)

Mr. C. B. MCCONNELL, called as a witness for the defendant, testified in substance as follows:

I am a practicing attorney in the town of Burns, Oregon. (R. 2418.)

Mr. CLAUDE MCGEE, called as a witness for the plaintiff, testified in substance as follows:

I am 59 years of age and at the present time reside in Burns, Oregon.

I have lived in Harney County since 1887.

I was at Harney Lake in 1888. (R. 2008.)

Mr. ARCHIE MCGOWAN, called as a witness for the plaintiff, testified in substance as follows:

I am 55 years of age and at the present time reside in Burns, Oregon.

I first came to Harney Valley in 1882. I was absent from Harney Valley from 1890 to 1900, but I have lived here continuously since 1900.

I never did live around the lakes. I have been down there quite a little. (R. 1550.) The biggest thing that attracted me there was the game. I have been there with friends whom I took to observe

the (Malheur) lake and the wild life; I have had some business there during the time I was in the real estate business.

I am more familiar with Malheur Lake since the spring of 1901, and I do not think there has been a year since that time to the present date that I have not been on a part of that lake.

I remember the lake as far back as either the summer of 1883 or 1884; possibly as late as 1885, but I really think it was in 1883, although I was pretty young at the time. I was seven years old when I first saw Malheur Lake, but I have a picture in my mind as to the way it looked from the east side. (R. 1551.)

Mr. WILLIAM HENRY MCKENZIE, called as a witness for the plaintiff, testified in substance as follows:

I am 55 years of age and at the present time my home is at the Narrows. (R. 2146.) I have lived at the Narrows continuously since 1889 or 1890. (R. 2147.)

Mr. ROBERT J. MCKINNON, called as a witness for the plaintiff, testified in substance as follows:

I am 68 years of age, and at the present time my occupation is that of mail carrier under contract.

I have been in Harney County about 43 or 44 years (since about 1887).

I first went down around Malheur and Harney lakes in about 1887 or 1888; I was employed by Johnnie Neuman one spring riding after cattle; that was the "P" outfit. I rode down there in Malheur Lake just one season. I believe it was in the fall when we were gathering the beef. I have been down around Malheur Lake from time to time since then, and I have been around the Narrows that often, and on the south side of Malheur Lake. (R. 810.)

I did not go into Malheur Lake with cattle, I worked there, below the lake on the Sodhouse Ranch, and I was hauling, and I would go through there (the Narrows).

I do not know the years that I was engaged in freighting, but it was just about twelve or thirteen years off and on. (R. 811.)

Cross-examination:

I do not know anything about the meander line on Malheur Lake. (R. 816.)

Mr. ALFRED L. MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

I am 60 years of age and at the present time I reside at Voltage, Oregon, south of Malheur Lake.

I first came to Harney County in 1884.

At the present time I am the owner of some property in the vicinity of the (Malheur) lake. (R. 2066.)

(NOTE.—The Marshall place embraces Lots 5, 6, 7, 8, 9 and 14, and the northeast quarter of the southwest quarter of Section 31, T. 26 S., R. 32 E., south of the lake. Pecore.)

I really have been in use (possession) of that property since 1889. (R. 2067.)

Mr. GEORGE MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

I am 72 years of age (and at the present time I reside at Niland, Imperial County, California.)

I have lived in Harney Valley since 1884.

I used to own a place down near the lakes, but I do not own it now. I moved into that place in 1888, and I continued to live there until 1900; I moved away in 1901. I was there from 1888 to 1900. (R. 1686.)

Mr. JOHN MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

I am 51 years of age, (and at the present time I reside at Marshfield, Oregon).

I lived in Harney County since 1884. (R. 2231.)

I had some patented land located down in that country near the (Lake Malheur) Bird Reserve. (R. 2231–2232.)

They told me the other day that the John Marshall place was now the Hill Brothers place. I sold it to Bunyard, and I haven't been back down in that country since I sold it to him. I call it the Bunyard place.

I used some of that land in the (Lake Malheur) Bird Reserve, but I did not have any fence out in the Bird Reserve at all. (R. 2232.)

Mrs. MARY MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

I am the wife of Mr. Alfred L. Marshall, the preceding witness; my maiden name was Stover.

I first came to Harney County in the latter part of October, 1899.

My husband lived down there near the (Malheur) lake a good many years before I came here, but I have lived down there ever since December 29th, 1902. (R. 2096.)

Mr. EDMUND J. MARTIN, called as a witness for the plaintiff, testified in substance as follows:

I am 80 years of age and at the present time reside in San Francisco. I first came to Harney Valley in 1882.

When I first came here, I came with George McGowan, my brother-in-law; we went into the mercantile business up at the place we called Egan at the time (near Burns, Oregon). (R. 1914.)

Mrs. EMMA MILLER, called as a witness for the plaintiff, testified in substance as follows:

I reside at the present time over on Skull Creek, in the southern end of Harney County. (R. 638.) I lived on the shores of Harney Lake from 1889 until 1908. I was down at Harney Lake in June, 1931.

I do not know a thing about Malheur Lake. I couldn't tell you a thing about it. (R. 642.)

Redirect examination:

I never was at the Sand Reef. (R. 645.)

Mr. SAMUEL T. MOTHERSHEAD, called as a witness for the plaintiff, testified in substance as follows:

I am 59 years of age and at the present time I reside at Burns, Oregon.

I have lived in Harney Valley since the spring of 1892.

I was a member of a kind of a peace committee that met in the fall of 1921, and which tried to settle this controversy. (R. 2172.)

Mr. PRIM ORTEGO, called as a witness for the plaintiff, testified in substance as follows:

I am 68 years of age and was born at Red Bluff, Tehama County, California, and raised in Colusa County, California.

I came to Harney Valley in 1873 with Peter French. I knew him before I came here. (R. 497.) When I arrived here I went to work on the P Ranch, that is up the Blitzen River. I have worked there since that time up to now, and I am still working there. Generally my work consisted of riding after stock. I was foreman at one time for a short period.

My work took me around Malheur and Harney Lakes a good deal. (R. 498.) From 1877 when I first saw the lakes up to the recent years, I was down there almost every year. I have seen it in the spring, in the fall, and in the winter. (R. 499.)

Mr. CHARLES OTLEY, called as a witness for the plaintiff, testified in substance as follows:

I am 40 years of age (and at the present time I reside about three miles south of Lawen, Oregon).

I am a brother of the two witnesses (Henry and Richard Otley) who have just preceded me (on the witness stand).

I heard the testimony of my brother Henry Otley (R. 2216) and that generally coincides with my recollection of the situation up there, and if I were questioned further about it I should testify substantially as he has testified. (R. 2217.)

Mr. HENRY OTLEY, called as a witness for the plaintiff, testified in substance as follows:

I am 43 years of age and I live three miles south of Lawen, Oregon.

I was born in Harney Valley and I have lived here continuously ever since. There is a place known as the Otley Ranch on the north side of the (Lake Malheur) Bird Reserve. (R. 2207.)

(NOTE—Where Mr. Otley lives is the west half of the west half of section 16, T. 25 S., R. 32½ E., north of the lake. Pecore. R. 2208.)

I personally own 240 acres up there under fence besides some undivided land, estate land. (R. 2208.)

I own some land south of my own property which is held jointly with some other members of our family.

SPECIAL MASTER. Wouldn't it be well to get all the Otley lands?

Mr. BLACKMAR. All right. Give us all of the Otley lands.

Mr. PECORE. This (Plaintiff's) Exhibit No. 22 shows Mr. (Henry) Otley owning lot 1, of section 29, township 25 south, range 32½ east (north of the lake); Richard Otley as owning the west half of the northeast quarter, section 20; and Charles Otley as owning the east half of the northeast quarter of section 20; Charles and Richard Otley owning lots 3, 4, 5, and 6 of section 20, of township 25 south, range 32½ east. And it shows Henry and Dick Otley as being in possession of a strip of land a quarter of a mile wide and approximately three-quarters of a mile long; lying south of (R. 2210) the last subdivision I described; shows Henry, Charles, and Dick Otley as owning lots 10 and 11 in section 21; Fred Otley, jr., as owning the north half of the northeast quarter and the northeast quarter of the northwest quarter, and lots 2, 3, 7, 8, and 9 of section 21; Henry Otley as owning the northwest quarter of the northwest quarter and lot 1 of section 21, of township 25 south, range 32½ east; and it shows the Otleys as being in possession (R. 2210) of a tract of land approximately a half a mile east and west, and an average width of a little more than a quarter of a mile north and south, lying south of lots 1 and 2 of section 29, township 25 south, range 32½ east. That is all I see on this exhibit.

The WITNESS. Fred Otley, jr., is my brother. (R. 2211.)

Mr. RICHARD OTLEY, called as a witness for the plaintiff, testified in substance as follows:

I am 37 years of age (and reside three miles south of Lawen, Oregon).

I do not remember when I first became familiar with the lakes; it is as far back as I can remember. (R. 2216.)

I am a brother of the witness (Henry Otley) who was just on the stand. (R. 2215.)

I was in the court room while my brother was testifying, and my brother's testimony is my recollection of the situation there, and if I were questioned further about the matter I should testify substantially as my brother has done. (R. 2216.)

Mr. CARLTON EMERY PARKER, called as a witness for the plaintiff, testified in substance as follows:

I am 56 years of age, and reside about 10 miles north of Burns, Oregon.

I first came into Harney Valley in 1881. Since I was old enough, I commenced to ride, which was in the fall of 1888, and from that time on, I rode for six or eight years. I rode for some of the big ranches. I rode for Harden & Riley at Warm Springs. (R. 774.)

Mr. WALTER B. PARKER, called as a witness for the plaintiff, testified in substance as follows:

I am 68 years of age and reside at the present time at Redding, California.

When I was about 17 years of age, or in 1880, I came into Harney Valley, and in 1882 I started to ride for the Harden & Riley Company, for whom I worked for about four or five years. My work took me down around the lakes; I did most of the outside riding for them (R. 868), by that I mean I rode the cattle at Blitzen, at the "P" Ranch, and at Wright's Point here, and just the outside ranches. (R. 869.)

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

I am 36 years of age, and until I came to Burns, I resided in Washington, D. C., for five years.

At the present time I am a cadastral engineer in the Bureau of Biological Survey. (R–73.)

With the exception of a year I was in the army, I have been in the cadastral service since June, 1915, and during that time I have made surveys of lakes, rivers and things of that kind. (R–76.)

Mr. CHARLES R. PETERSON, called as a witness for the plaintiff, testified in substance as follows:

I am 70 years of age and at the present time I reside about seven miles south of Venator Siding, Oregon.

I first came into Harney Valley in 1883, but at that time I did not acquire any land here. I lived near Malheur Lake and owned some land on the north side of the lake close to Lawen; I also had some land for a few years down below the meander line. Sam Goodman resides on that place now. (R. 673–674.) It is located just half a mile east of the northeast corner of section 1, T. 26 S., R. 32 E., north of Malheur Lake.

I went into that particular piece of land in 1899. (R. 674.)

Between 1884 and 1899 most of the time I was on what they call the Home Ranch on the south fork of Malheur Lake.

The first two years I was here I didn't own any land; then I pre-empted some land on Stinking Water, but I didn't live there and make it my home.

I worked for myself, and rode with the outfit; the second year I worked for Stauffer in the fall, that was in 1886, and I bought this ground; then after that I lived on what we called the Home Ranch. (R. 675.)

Mr. A. A. REINEMANN, called as a witness for the plaintiff, testified in substance as follows:

I am 44 years of age and at the present time reside at Burns, Oregon. (R. 1663.) I was six months old when my parents brought

me here into Harney Valley in 1887. My father had a place on the (Malheur) lake known as the Reinemann place. At the present it is an estate, in the family. It is a homestead, and patented land. (R. 1664.)

Mr. TOBIAS STILLEY RIDDLE, called as a witness for the plaintiff, testified in substance as follows:

I am 82 years of age and at the present time I live in Douglas County, Oregon.

I first came to Harney Valley in 1872; brought cattle in here; (R. 537) did not see the lakes that year. Next year, in December of 1873, I was down to Malheur Lake and crossed it; I was riding my own stock. (R. 537–538.)

Mr. L. W. SHEPARD, called as a witness for the plaintiff, testified in substance as follows:

I am 66 years of age and reside about 30 miles northwest of Burns, Oregon. I have lived in Harney Valley for about 37 years.

I was never very familiar with Malheur Lake; the first observation I had of it was about 1895. (R. 1290.)

Mr. JOSEPH LOGAN SHIRK, called as a witness for the plaintiff, testified in substance as follows:

I am 52 years of age and reside at the present time at Modoc Point, Klamath County, Oregon.

My earliest remembrance of Harney Valley was in 1888, and 1889. Those were the two years of my first earliest remembrance of this country.

In later years I worked with cattle. (R. 938.)

I was here in the Harney Valley district some years previous to 1897, and from that time to different times until I left here in 1906, when I went to take cattle out of this county over into the Guano country.

I have known this country through cattle operations for about ten years, from 1897 to 1906. (R. 939.)

Cross-examination:

Peter French was killed in 1897. (R. 945.) Mr. Oliver was not acquitted promptly at that time. He was just a rough-neck like a good many of the rest of us at that time.

SPECIAL MASTER. That was before the death of Peter French?

A. That was before he got any notoriety at all. He semed to be sort of a decent fellow to ride with, and he happened to be in Diamond. I was going to locate some place to stay all night, and he invited me to stay with him (R. 946), and that is how I came to make that ride, instead of riding to the left; and I think ultimately I didn't stay with him, because I met an old-time friend and stayed with him.

Mr. LILJEQVIST. Q. Peter French incurred the enmity of a great many people in those days, didn't he?

A. Yes, sir.

Q. He didn't stand much chance in any litigation he had with the settlers, did he?

A. He seemed to win a lot of them, whether he had any chance, or not.

Q. And they finally killed him?

A. This man Oliver killed him; that is, the records show it. I wasn't present, but I am certain he killed him.

Mr. LILJEQVIST. We won't try that case now.

A. No. You will start up some memories if you do.

Mr. LILJEQVIST. Just for the record, anyway—it may be incompetent.

Q. It was practically a deliberate killing, wasn't it? (R. 946.)

A. No.

Mr. BLACKMAR. I do not think that is material.

Mr. LILJEQVIST. I won't press it.

A. Whenever a man hits another man with a horsewhip he needs killing. (R. 947.)

Mr. GEORGE WASHINGTON SIMMONS, called as a witness for the plaintiff, testified in substance as follows:

I am 50 years of age, and I have lived in Harney Valley since 1888. My family used to live south of the (Malheur) lake next to the Sodhouse, about three miles from the Sodhouse, I should imagine. (R. 1748.)

I left there in 1913. (R. 1748.)

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, testified in substance as follows:

I was born on the 9th of April, 1861 (and am 70 years of age). I have lived in this county a little over 45 years, and at the present time I am District Attorney for Harney County.

I first became familiar with Malheur Lake in October of 1886.

I have lived near Malheur Lake, and I never have owned any property on Malheur Lake. My brother owned land down on the west end of Harney Lake, but not me. (R. 1646.)

Mr. HARRY Z. SMITH, called as a witness for the defendant, testified in substance as follows:

I am in the garage business (in Burns, Oregon). (R. 2401.)

Mr. PHILLIP GORDON SMITH, called as a witness for the plaintiff, testified in substance as follows:

I am 69 years of age, and am still a bachelor.

At the present time I live about three miles below town (Burns, Oregon), in section 30.

I have lived here in Harney Valley since September 12, 1884, and nearly all of that time I have been in the cattle business handling my own stock. (R. 1743.)

Mr. RICHARD A. SMITH, called as a witness for the plaintiff, testified in substance as follows:

In this country I am known as Dick Smith. I am 66 years of age and I have lived in Harney County since 1889. (R.1298.)

Mr. SETH S. SMITH, called as a witness for the plaintiff, testified in substance as follows:

I am 64 years of age and at the present time reside in Burns, Oregon.

I first came to Harney Valley April 14, 1888.

I first went down around Malheur Lake along about 1895 up to 1900. At that time, I worked for the Pacific Livestock Company down on the ranch, buckarooing, and doing things of that kind.

I have been across there at the Narrows. (R.1770.)

I have never taken any cattle across there by Pinto Tom's place, or any of those places. (R.1771.)

Mr. COREY E. SMYTH, called as a witness for the plaintiff, testified in substance as follows:

I am 48 years of age, and at the present time I am employed at the P Ranch up at Frenchglen, Oregon. (R.1522.)

Mr. DARIUS HYNSON SMYTH, called as a witness for the plaintiff, testified in substance as follows:

I was born in 1844 and I am 87 years of age. I came to Oregon and right through Harney Valley in 1853, on my way to the Willamette Valley. When I came through here that time, I passed on the south side of both Malheur and Harney Lakes. (R. 454.) I do not remember now as to any place that we camped along those lakes, but I do know that was the first water we got off the hills. (R. 454–455.) Right in the lakes was where we got our first water for our stock. The water was brackish; alkali considerably. We used some of it for our camp and our folks. I was pretty young at that time. The most noted place that I can give memory of was when we got around and across the Blitzen and the condition the Blitzen was in I can remember well, because we had our wagon beds in the shape of boats; we never unloaded our wagons at all; we always pulled them into the stream with a rope; we would get a rope across and float the bed of the wagon off the running gears and take it right across a stream in the shape of a boat. People might not believe that, but that was the way we crossed the plains. We forded the streams ourselves. The stream was backed up good and full, that makes me remember that there was a good deal of water down on the lake. All the seams of the wagon boat were airtight; they were (R. 455) made that way. We were not the only ones that did that. There were two trains of (R. 455) about twenty wagons

in each train, and we were making a new route through the country that had never been made before. We left the old emigrant road down at the mouth of the Malheur River. We went around the lake and stopped at the Warm Springs which was a big warm spring at that time; we went over the desert and we never had any more water until we struck the Deschutes, where the military wagon road crosses.

I came back in 1872 to Harney Valley to live, and we had some stock. We came across the plains and we brought the stock with us. The first winter we established our home where the big saw mill is at those springs, about three miles from Burns. That was also a warm spring. We spent two winters there. The second winter (R. 456) we were there (1873–1874) we had to take our stock out; we took them to where I live now to what is called Happy Valley (R. 457).

Cross-examination:

I did not notice any buffaloes in the country when I first came here (in 1853).

Mr. LILJEQVIST:

I see this Peter Skene Ogden Journal tells about a lot of buffalo in the country when he came through. They weren't still alive when you came through in 1853? (R. 487.)

A. There weren't any buffalo here then, or if there was, I didn't see them. (R. 487.)

Mr. D. H. SMYTH, Junior, called as a witness for the plaintiff, testified in substance as follows:

I am 38 years of age; I have lived in Happy Valley in Steen's Mountain all my life. (R. 1463.)

Mrs. FANNIE SMYTH, called as a witness for the plaintiff, testified in substance as follows:

My full name is Mrs. George A. Smyth. My Christian name is Fannie. I reside at Fields, Oregon. I came to Diamond Valley in 1888. (R. 1068.)

Mr. GEORGE A. SMYTH, called as a witness for the plaintiff, testified in substance as follows:

I am 59 years old and live at Fields, Oregon. I am a nephew of D. H. Smyth. (R. 665.) I have been here in Harney Valley nearly all my life. I first saw Malheur Lake in 1884. (R. 666.)

Mr. ALVA SPRINGER, called as a witness for the plaintiff, testified in substance as follows:

I am 70 years of age. I have lived in Harney County since 1885, and I have lived in the neighborhood of Malheur Lake since 1888. I own certain property down there at the (Malheur) lake, and I have done so for a great many years.

Mr. BLACKMAR. Has your Honor got the Springer property in mind?

SPECIAL MASTER. Oh, yes. It is down where the spring is, isn't it?

Mr. BLACKMAR. Yes. (R. 2016.)

Cross-examination:

I did not file on land after the land was surveyed up to the Neal Meander Line. (R. 2031–2032.)

(NOTE: Mr. Springer owns lots 5 and 6, Section 34; lots, 5, 6, 7, 8; the southeast quarter of the northwest quarter, and the south half of the northeast quarter, and the northwest quarter of the northeast quarter, all in Section 35, T. 26 S., R. 31 E.

Final Certificate No. 807 was issued by the Government on January 26, 1903, to Alva Springer for Lots 5 and 6, Section 34; lots 7 and 8, and the southeast quarter of the northwest quarter of Section 35, all in T. 26 S., R. 32 E., south of Malheur Lake.

Final Certificate No. 809 was issued on January 29, 1903, to Louis B. Springer (Mr. Alva Springer's father) for the west half of the northeast quarter, and the southeast quarter of the northeast quarter, and lots 5 and 6, all in Section 35, T. 26 S., R. 31 E., south of Malheur Lake. Pecore.)

Mr. ALVIN C. SPURLOCK, called as a witness for the plaintiff, testified in substance as follows:

I am 62 years of age, and I have lived in Harney Valley since 1885, about 46 years.

My brother and I own jointly some property down near Malheur Lake.

(NOTE.—The Spurlock house is situated in the northeast quarter of the southeast quarter of Section 19, T. 25 S., R. 32½ E. Pecore. R. 1753.)

My brother has a homestead that extends down to the Neal Meander Line. That homestead lay south of the place we own jointly, and it is in Lot 8, Section 30, (T. 25 S., R. 32½ E. north of the lake). It runs clear down to the Neal Meander Line.

I was not living on that place (in the northeast quarter of the southeast quarter of Section 19, T. 25 S., R. 32½ E.) at the time Mr. Neal ran his line. We bought that property in 1898.

My brother was not on his homestead at the time that Mr. Neal ran his meander line through there; he had not taken it up or acquired it at that time. (R. 1754.)

I know Mr. James A. Turner who has just testified. I remember of him being down in there (Malheur Lake), but I don't remember where his place was located. (R. 1759.)

Cross-examination:

Mr. LILJEQVIST. Q. Now, has there been any litigation between the riparian owners and these squatters that have encroached in there from year to year?

A. Why, I think there has been some little kicking about (R.1761) them being down in there.

I think there is a little corner of my brother's place that is fenced below the (Neal) meander line. (R. 1761–1762.)

I have known that country I think since about 1892, that is about the first time I went down in there that I remember.

In recent years as time has gone by they (the settlers) have been building fences all through that western part (of Malheur Lake).

Mr. LILJEQVIST. Q. In all the years you have known it, you have never known the Government ever trying to prosecute anybody for fencing Government land, which they could do if it was Government land, have you?

A. I don't know personally.

Q. The Government has never tried to prosecute anybody for fencing this so-called Government land in all the time you have known it?

A. I think Tom Turner, that they fined him $500.

His property is away over in Barren Valley.

Mr. LILJEQVIST. Q. That is not Malheur Lake.

SPECIAL MASTER. Is that as pertinent on the matter of (R. 1762) title as the questions put by Mr. Blackmar?

Mr. LILJEQVIST. Mr. Blackmar knows there is a Federal statute that has been in force before he was born which says that it is a crime to fence Government property, and I asked if they ever prosecuted anybody here, and they haven't done it. Maybe that is why a lot of fellows are afraid of the Government. I think that is why it is pertinent.

The WITNESS. I was never afraid of the Government. (R. 1763.)

Mr. CHARLES A. SPURLOCK, called as a witness for the plaintiff, testified in substance as follows:

I am 67 years of age, and I came to Harney Valley in 1885 and I have lived here continuously ever since.

I have a place up on the north side of Malheur Lake, which I purchased in the fall of 1888. (R. 1763.) That is the place that my brother has just testified about. It is in Sections 8 and 9 (T. 25 S., R. 32½ E.).

In addition to that property (Sections 8 and 9, T. 25 S., R. 32½ E.) I have taken a homestead lower down on the (Malheur) lake. They call it the lower place. (R. 1764.)

Major JOHN STAFFORD, called as a witness for the plaintiff, testified in substance as follows:

I reside at San Diego, California, and I am 77 years of age. I have been in the service of the United States Army for 56 years. I have been in all branches: Infantry, Cavalry, Quartermaster's Corps, and so on.

I was depot quartermaster in New Orleans, during the late war.

In July, 1876, I came to and was stationed at Camp Harney, Oregon, and remained there until the 15th of June, 1877; then I

returned the 1st of September, 1877, and left there in June, 1878. (R. 1262–1263.)

Mr. GRANT THOMPSON, called as a witness for the plaintiff, testified in substance as follows:

I was born in 1863 and at the present time I reside in Lawen, Oregon.

I first came to Harney Valley in 1884 with a surveying party on a Government contract, and was only in the country at that time about three months. We did some surveying in the eastern part of the county, not in the valley. (R. 698.)

I returned to Harney County in October, 1885, and remained a short time here at Burns; and then went to Harney for a month or six weeks, and then located on what is known as Crane Creek, east of the valley, and by road about forty miles from Burns, in a direction a little south of east. I have been in this vicinity ever since.

I know very little, or practically nothing about Harney Lake; have been around it a time or two, but that was years ago.

I was out there looking around for the purpose of putting up hay at that time. I was not working for any of the big companies. (R. 699.) I was right there in the vicinity of Lawen; right close to Lawen; and in fact, it was in the spring of the season and the haying season had just practically begun; at that time the settlement was just being made, or had been made in there shortly before, and there were parties that had hay they wanted to put up on shares; I was out there for that purpose looking (R. 700) over the prospects.

It was my understanding that the land that I was looking over was not patented land. This was probably in the month of July, maybe the latter part. (R. 700.)

Mr. ORIN EUGENE THOMPSON, called as a witness for the plaintiff, testified in substance as follows:

I am 63 years of age, and for the last 25 to 30 years I have lived on the east side of Malheur Lake close to Windy Point. (R. 1505.)

I first came to Harney Valley October, 1887. (R. 1512.)

Generally my occupation since I have been here has consisted of running of stock. (R. 1505–1506.)

Cross-examination:

I have never owned any land along the border of Malheur Lake. (R. 1513.)

Mr. FRANCIS W. TRISKA, called as a witness for the plaintiff, testified in substance as follows:

I am 44 years of age and at the present time I live about two and a half miles northeast of Burns, Oregon.

I first came into Harney Valley in 1910, and took up my residence in about the present (Lake Malheur) Bird Reserve in 1915. (R. 2196.)

At that time I lived most of the time down at the Narrows and at Springer's, what they call the Sodhouse Spring.

Mr. BLACKMAR. Q. You never had any land within the Bird Reserve?

A. I had some land north.

From 1915 to 1918 I held the position with the Government (Department of Agriculture Bureau of Biological Survey) of warden (of the) Lake Malheur (Bird Reserve). (R. 2197.)

Mr. JAMES A. TURNER, called as a witness for the plaintiff, testified in substance as follows:

I am 63 years of age, born in 1868. (R. 1719.)

I have lived in Harney Valley since 1891; there were a few years I was down to Vale, Oregon, then came back here.

I have lived around the lakes since 1891.

I formerly had a place right south of where Ben Ausmus has got his place down there (in Malheur Lake), as nearly as I can tell you the description of it.

(NOTE.—The Ben Ausmus house is about a quarter of a mile south of the south boundary of Lot 1, Section 28, T. 25 S., R. 32½ E. Pecore. R. 1720.)

My house I would say was a quarter of a mile below where the Ben Ausmus house in located. (R. 1720.)

Mr. THOMAS J. VICKERS, called as a witness for the plaintiff, testified in substance as follows:

I am 76 years old; I reside at Harney City (R. 244); I have lived here since 187[illegible].

I have worked in and about Malheur Lake first for Todhunter & Devine; I have worked in and about Malheur Lake on this side for about thirty years. (R. 245.)

Mr. THOMAS L. VICKERS, called as a witness for the plaintiff, testified in substance as follows:

I am 46 years of age, and I was born up here close to Old Fort Harney, Oregon, and I have lived here in this neighborhood ever since.

I and our family at one time lived down there below Ruh's (place), inside the boundary of the present (Lake Malheur) Bird Reserve, which was known as the Vickers place. The first time I was down there, I was not very old. My brother and I came in possession of the ranch in the spring of 1905 (R. 2310) and we hayed and run our cattle in there until the spring of 1910, when we sold 500 head of cattle and the improvements on the ranch to C. R. Peterson. My brother and I were not married at the time we were living there, except my brother was married in the winter of 1909, and he lived there that winter with his family.

We had two houses, a granary, a barn and weaning place for stock on that land. We had the usual out-door equipment that goes with ranches around in this part of the country.

With reference to the condition of the fences: On the south side of this place there was no fence; it narrows off more as it goes in towards the east, and this high ground; and this here [indicating on map, Plaintiff's Exhibit No. 3] we always called it the lake shore, and there was a pretty high rim next to the fence. The cattle would drift out into the lake all the time, from this shore out to the north fence [indicating]; and then running (R. 2311) west to the Hayes' corner, and then south back to the lake shore would be in the neighborhood of pretty close to 300 acres, I would judge; I never figured up on that. (R. 2311.)

Mr. ALPHENA VENATOR, called as a witness for the plaintiff, testified in substance as follows:

I am past 69 years of age. I first came to Harney Valley in 1872, and I settled about where the cook house stands now on the Island Ranch. At one time I rode more or less for the Island Ranch. I rode with them a great deal. We sold out the fall of 1877 and left there the winter of 1878, and delivered the cattle.

I was in and about Malheur Lake between 1872 and 1878; principally all of it; all of the north side, and around (R. 2316) on the south side. (R. 2317.)

I formerly had a place up around what is known as the Swan Lake Field. I located there in 1903, and I sold the place in January 1909, but remained there until 1912. I had several houses there and I lived in there at all seasons of the year. I had a man there during all seasons of the year. (R. 2321.)

I was in the cattle business when I was in there, and I followed the cattle up around there, and cut hay. We stacked ordinarily during the years that I had it about 1,500 or 2,000 tons of hay; it would be hard to estimate, but we ordinarily cut a great area, and we would stack it and leave it on the ground for the cattle to winter. (R. 2322.)

In 1898 I owned a piece of property up near the Otley place. I had the Jordan ranch leased. I had the Jordan ranches, but I do not know just the year. I had the Jordan, the Spurlock, the J. O. Hendricks, the Armack and clear all around the (Malheur) lake; then I skipped (R. 2322) the Graves' (place), and I crossed the channel then over on to the other (south) side; but in later years—I cannot place the year—I had the Bill Marshall place and other places over on the channel. (R. 2322.)

Mr. PAUL WARE, called as a witness for the plaintiff, testified in substance as follows:

I am 49 years of age and at the present time I reside at Cambridge, Idaho.

I formerly lived in Harney Valley right near the Richard A. Smith place. We moved onto the ranch in the spring of 1891, which was located on Mud Lake, and continued to live there until 1901. (R. 1315.)

Mr. JUDD A. WISE, called as a witness for the plaintiff, testified in substance as follows:

SPECIAL MASTER. Now, Mr. Wise, you are not a trapper?

A. No, sir. (R. 1951.)

I am 41 years of age, born in 1890.

At the present time, I reside in Happy Valley, Oregon. I have lived in Harney Valley for some time, and during that time, I have had occasion to go down around the lakes.

The first time I was ever at the (Malheur) lake, was in 1902; I was not very old at that time; I made a trip down there then with my brother to get some groceries at the Narrows. I got a little bit farther into the (Malheur) lake and became better acquainted with it after 1902. (R. 1952.)

Mr. FRANK WHITING, called as a witness for the plaintiff, testified in substance as follows:

I was 60 years old last May. I reside four and a half miles north and east of Burns, on Poison Creek. (R. 183–184.) I am the younger brother of Schuyler Whiting. We came to this country together with our parents. I was three years old then. I started to work when I was about fourteen or fifteen years old, chasing mustangs and running cows. Then I went to work for Todhunter & Devine, later I worked for the P. L. S. Co., who bought out Todhunter & Devine; (R. 184) that may have been along in 1884 to 1886. The Todhunter & Devine ranch is known as the Island Ranch about twelve miles south and east of Burns at what we called Wright's Point. At one time Wright's Point was an old Government camp called Camp Wright. My work for Todhunter & Devine and the P. L. S. Co. took me down to Malheur & Harney Lakes a great deal. I was down there for the first time in June, 1885, or 1886. We were working there with the cattle; they were watering at the lake. There was no other water, only at what we called Nine Mile Slough, and from there the cattle would go eight or nine miles to the lakes to water: (R. 185) they congregated more or less along the edges of the lake.

I lived right on the Silvies River right across from (R. 186) where my brother stated he lived at that time. (R. 186.)

Mr. GEORGE E. WHITING, called as a witness for the plaintiff, testified in substance as follows:

I am 58 years old and I live three miles from the town of Burns, Oregon. I am a brother of Frank and Schuyler Whiting. I came here to Harney Valley with my parents at the same time they did, in 1874. (R. 548.)

I went to work when I was about sixteen, that would be in 1890. At that time we didn't pay much attention to whether it was a dry or a wet year; I can not recall those things.

I worked for the Pacific Livestock Company and cared for the stock. I continued to work for them that summer (1890—maybe

earlier); didn't work again for them for a number of years; the last year I worked for them down at Malheur Lake was in 1902 or 1903. (R. 549.)

My work with the Pacific Livestock Company with stock took me into Malheur Lake in the winter time; one winter we had exceptionally bad weather, with blizzards, and the stock had drifted and we were kept down there to keep the cattle from drifting too far into the lake. The cattle were at the mouth of the Silvies River and on the lake (R. 551–552.)

Mr. SCHUYLER WHITING, called as a witness for the plaintiff, testified in substance as follows:

I am 63 years old; reside close to Burns; I first came to Harney County in 1874 and with the exception of one year, I have been here ever since. When we first came, we settled where Burns is now in the fall of 1874 to 1875 and I saw the lakes from a distance in the fall we came here. I remember seeing the lakes from along the road. (R. 170.) I was near the lakes off and on from 1879 until about 1885. (R. 174.)

After 1879, we were down there every spring clear to the lake and around the side of the Butte to gather horses after the ice broke up (R. 176), sometimes as early as the 15th of April to along the middle of May. (R. 177.)

When I went to work I was engaged mostly in riding for myself and father who had a ranch here. (R. 170.) His ranch was located two miles north of Burns right on the banks of the Silvies River where I have continued to live for a number of years. (R. 171.)

I worked for Pete French in 1895, 1896, and 1897. I took some cattle in the fall of 1895 from here around to the Sodhouse by way of the P. L. S. Co.'s Island Ranch, Wright's Point, the Narrows, and then around to the Sodhouse. (R. 179–180.)

Mr. JOHN H. WITZEL, called as a witness for the plaintiff, testified in substance as follows:

I am 70 years of age and I first came to Harney Valley in 1877.

At the present time, I live over on the Blitzen River, this side (or north) of Frenchglen.

Since 1877 I have lived most of the time in Harney Valley and during that period from time to time I have become familiar with Malheur and Harney Lakes. (R. 1094.)

I didn't do a great deal of riding in the early days around the Silvies River. (R. 1100.)

Mr. LOUIS WOLDENBURG, called as a witness for the plaintiff, testified in substance as follows:

I am 62 years of age, and reside at Canyon City, Grant County, Oregon.

I first came into Harney Valley on November 5, 1884, 47 years ago yesterday. (R. 747.) I came in on horseback. (R. 748.)

I first saw Harney Lake about November 28, 1889, when I was coming through on the stage from Fort Bidwell to Burns. That was the time I came here to reside. (R. 748.) I think I have seen the Sand Reef. That day I was on the regular road that the mail was being carried over; did not pay much attention to it; we were on high and low ground, both. (R. 749.)

I have been down around the Narrows. (R. 752–753.)

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JOINT ABSTRACT OF RECORD

(Arranged according to subjects of proof and reference thus: "(R. 100)" is to original typewritten transcript of evidence.)

A. Contour Survey, 1931: Evidence Relating to Malheur, Mud and Harney Lakes, Including the Narrows

1. In General

Mr. Chester W. Pecore, a witness called by the plaintiff, having qualified as a cadastral engineer in the cadastral service of the Government since June 1915, and since April 1931 with the United States Biological Survey, Department of Agriculture, testified in substance as follows:

A cadastral survey is a survey having to do with the fixation of civil properties. The term "cadastral" is used in the General Land Office, and is applied to an engineer who goes into the field with a minimum of detailed instructions to take care of any kind of survey arising in connection with public land survey or re-surveys; file a competent report thereon, with his recommendations as to what should be done; to execute surveys if possible, rather than surveys calling for a preliminary report. (R. 75–76.)

In April 1931, I was instructed to proceed to Burns, Oregon, to make a topographic and cadastral survey together with a map in connection therewith in connection with the present case. (R. 76.)

Since April 1931, and until about October 1931, I have been actively engaged practically all the time in the field at the lakes in the engineering and survey work of surveying the lake beds of Malheur, Mud and Harney Lakes, together with certain lands adjacent thereto. During the month or six weeks preceding my testimony, I spent a great deal of time in Burns supervising the drafting of these maps, (Plaintiff's Exhibits Nos. 3 and 4). (R. 76–77.)

The elevations shown on the maps (Plaintiff's Exhibits Nos. 3 and 4) were obtained in this way. We commenced from a bench mark which is indicated on the map (Plaintiff's Exhibit No. 3) just about one-third mile east of Saddle Butte, (R. 107) which bench mark was established by the United States Coast & Geodetic Survey. (R. 77.) That is the description given in the bulletin, and the Saddle Butte mentioned in the bulletin is the town of Saddle Butte that was then in existence, and since disappeared, rather than the topographic feature known as Saddle Butte. The bench mark is approximately three-quarters of a mile east of the eastern end of the topographic feature of Saddle Butte, and it is very near the north boundary of Section 18 of T. 25 S., R. 33 E. (R. 107–108.) That particular bench mark consists of an iron post; it is a galvanized iron pipe having a thickness in material of nearly ¾", with a bronze cap riveted to the top of it and a flanged bottom 3" in diameter.

The post is filled with concrete, and on top of the post is marked the number of the bench mark in which it is described in their bulletin. The elevations are ordinarily not stamped on the top of the bench mark, but the markings are on the cap, and there can be no question as to whether you found the right bench mark. Those posts are ordinarily set in the ground about two-thirds of their length. (R. 108.)

It is conceded by the engineering profession that the United States Coast & Geodetic Survey leveling and triangulation work is the most accurate that has ever been done in the history of the world. In connection with their precise leveling (R. 78) work, they, at intervals, of an average of every two or three miles, establish a permanent monument known as a bench mark, and obtain the elevation of that bench mark, which is subsequently published in bulletins wherein they describe the bench mark, its position, and the elevation in such a manner that an engineer can go to the identical bench mark. This bench mark that I located and identified was our starting point, from which we carried a line of levels by the usual Wye leveling methods, or spirit levels, down to the meander line on the north side of Malheur Lake, near the base of what is indicated as Pelican Island; from that point we carried a line of levels southerly along the Neal meander line, and westerly along that meander line to the Narrows, down to the westerly end of this map (Plaintiff's Exhibit No. 3) where there is a State bench mark, to which we noted our elevation. In lineal feet that would be about 33 miles along the south, and about 29 miles along the north. Those distances may be reversed, but the total perimeter of Malheur Lake is approximately 62 miles (R. 78) by the Neal meander line.

Having reached the point on the south, we then began at our initial station near Pelican Island, or the Coast & Geodetic bench mark, already described, and ran a similar line of levels along the north side of Malheur Lake, following the Neal meander line until we reached the Narrows. At the bench mark established by the State, the elevation of which was previously noted, our (R. 79) error in that circuit of 62 miles was 34 hundredths of a foot, approximately; I believe it was .344 of a foot, or about 4½ inches in 62 miles, which is within the requirements of the United States Geological Survey second order levels, and we attempted to keep our leveling work within their requirements as to accuracy. (R. 79.)

We distributed that error back through the meander line; half of it in the north side, and half in the south side. And then from our adjusted points on the meander line, we ran parallel lines (setting stakes on them at intervals of 10 chains or 660 ft.) and a mile apart south across the lake bed, beginning at the southern terminus of each of the north and south section lines; so that we had parallel lines a mile apart all the way across Malheur Lake from the east and to the west end. There is one place down about the southeast

corner of T. 25 S., R. 32 E. where the lines are considerably less than a mile apart because of the shortage in the sections east to west; but there is no place that there is not a level line, with elevations taken from stakes firmly set in the ground at intervals at not to exceed 10 chains, or 660 ft., within a half mile, anywhere within the meanders of Malheur Lake.

When there were errors, which are small, as to the elevations on those cross lines (parallel lines running north and south across the lake) they were adjusted between the north (R. 80) meander line and the south meander line, using the meander line as a base. When these adjusted elevations were obtained we went out into the field with our plane tables, and from our stakes, we determined our contours of that lake bed by the usual plane table method. (R. 80.)

Everything we have done in connection with that survey including the handling of the errors has been according to approved, recognized present day engineering standards, and there are no errors in those surveys to my knowledge (and if they were there I should know it) of such magnitude as to affect the issues in this case, as I understand them. (R. 80–81.)

In this country there are duplicate townships and they are distinguished by being north or south of Malheur Lake; therefore I have referred to these townships as "north of the lake," or "south of the lake." (R. 122.)

a. Plaintiff's Exhibit No. 3

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

The Neal meander line of 1895 has been indicated on the map, Plaintiff's Exhibit No. 3, and can be identified by reference to the termini of these section lines. In townships south of the lake the Neal meander line connects the termini of the various section lines of the township; south of the Neal meander line the lot numbers of the sections are indicated; north of the Neal meander line, there are no section lines indicated on the map nor are there any lot numbers. That is following on the south side of the lake. Along the east side of the lake the Neal meander line connects the western termini with the lot numbers to the east. Along the northern side and the western side of the lake it connects the southern termini of the section line. The distinguishing feature is the fact that outside of the Neal meander line the lot numbers as shown on the general public land plats are indicated. (R. 83.)

The contours which are shown in brown on the map, Plaintiff's Exhibit No. 3 are lines connecting points of equal elevation. They are drawn at one foot intervals; that is, a contour indicated on the map as "92" is one foot lower than a contour having number 93 on it. We have omitted from this map the figures "40" from eleva-

tions below 4,100 feet, and we have omitted the figures "41" from elevations above 4,100 feet so that contour lines indicated here as "93" have an elevation above sea level of 4,093 feet. A note explaining this is to be found at the bottom of the map. (R. 84–85.)

These contours were made in the field by an actual plane table survey, which is an approved, and the commonly used method by the Government. (R. 84–85.)

That part of the map (Plaintiff's Exhibit No. 3) which appears to be the center of the lake, there are certain lines drawn through it. We have indicated graded roads by two parallel solid lines, and other roads by the dotted parallel lines; that is the usual symbols of indicating roads of that kind; and we have also used the (usual) symbol for indicating wire fences on the same map. (R. 112.)

Cross-examination:

I now mark with a red dot in a red circle with red pencil on Plaintiff's Exhibit No. 3 a point which I estimate to be 4° 33′ West, 6,102 feet from the corner of sections 17 and 18, T. 26 S., R. 32 E., north of the lake. (R. 2254–2256.)

I now mark with a red dot in a small red circle on Plaintiff's Exhibit No. 3 a point 1,097 feet north of the quarter section corner line between sections 10 and 11, T. 26 S., R. 33 E. The mark is close to "No. 2" in section 10, T. 26 S., R. 33 E. (R. 2256.)

b. Plaintiff's Exhibit No. 4

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

On Plaintiff's Exhibit No. 4, in the upper right-hand corner, is an enlarged diagram of the Narrows at a scale three chains to an inch. In the lower right hand corner of Plaintiff's Exhibit No. 4 is a similar diagram on the same scale showing the Gap in the Sand Reef. (R. 127.)

Redirect examination:

The end of the Sand Reef shows up on the map, Plaintiff's Exhibit No. 4, in Section 20, T. 26 S., R. 30 E. (R. 2287.)

Mr. BLACKMAR. In the examination of Mr. Pecore, I did not take up with him the preparation of the Harney Lake map. It is agreed between Mr. Liljeqvist and myself that the map was prepared in the same manner and under the same circumstances as the map with reference to Lake Malheur.

Mr. LILJEQVIST. Yes, sir.

SPECIAL MASTER. Is that an exhibit already in evidence?

Mr. BLACKMAR. That is (Plaintiff's) Exhibit No. 4.

SPECIAL MASTER. This stipulation supplies the preliminary proof.

Mr. BLACKMAR. Yes, sir.

Mr. LILJEQVIST. Yes, sir. (R. 2344.)

c. Plaintiff's Exhibit No. 5

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

Plaintiff's Exhibit No. 5 was received in evidence and identified as a small scale index map or plat of Malheur and Harney Lakes, showing roughly the location of certain oblique aerial survey photographs, and the direction in which the camera was pointed when these photographs were taken. (R. 128–129.)

d. Plaintiff's Exhibits Nos. 6 to 18, inclusive

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

These Plaintiff's Exhibits Nos. 6 to 18, inclusive, were received in evidence and identified. (R. 129.)

They are oblique aerial photographs of Malheur and Harney Lakes and vicinity taken by the Fairchild Aerial Company, at the same time that the aerial photographs were taken of which the mosaics (Plaintiff's Exhibits Nos. 19 and 20) were made, and all of them, except those I will now identify and give the approximate location of where they were taken, are shown on Plaintiff's Exhibit No. 5.

Plaintiff's Exhibit No. 6, an oblique aerial photograph, is not identified on the map, Plaintiff's Exhibit No. 5; it is the lower border of the picture and covers the country near the mouth of the Silvies River which is in the southwest portion of T. 25 S., R. 32½ E. and the camera was pointed in a southwesterly direction; in the upper right-hand corner is shown part of the alkali bed (R. 129) of Harney Lake. In the left, or along the left margin is a part of the center of the bed of Malheur Lake.

Plaintiff's Exhibit No. 7 is an oblique aerial photograph of Harney Lake taken west of the western end of the lake and showing a part of the water flowing from the springs at the western end of the lake; in the lower portion of the picture it shows the large alkali portion of the lake in about the center of the picture. (R. 130.)

On Plaintiff's Exhibit No. 15, a large hill, or butte, is Windy Point at the east end of Malheur Lake. (R. 130.)

e. Plaintiff's Exhibit No. 19

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

Plaintiff's Exhibit No. 19 is an aerial mosaic of Malheur Lake from a point one-half mile west of the Narrows to over beyond the east end of the lake, including Windy Point; and from the south edge of the lake it extends north beyond Saddle Butte, and includes every part of Malheur Lake. (R. 131.)

f. Plaintiff's Exhibit No. 20

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

Plaintiff's Exhibit No. 20 is an aerial mosaic of Harney and Malheur Lakes and it covers the territory at least two miles west of the meander line on the west side of Harney Lake to, or a little east of the Narrows; and from one-half mile south to at least a mile north of the northern shore of Harney Lake.

The aerial mosaic is a composite picture of a series of pictures put together in their proper relation after being photographed from an aeroplane. (R. 131–132.)

g. Plaintiff's Exhibit No. 21

Mr. CHESTER W. PECORE, recalled as a witness for the plaintiff, testified in substance as follows:

Plaintiff's Exhibit No. 21 is a status diagram showing the names of the divisions and the dates upon which patents were issued to the lands inside the red line, and between the red line and the meander line around Malheur and Harney Lakes.

The uncolored sections and smaller divisions are Government lands.

The colors on the map do not indicate a particular kind of entry; they are put on there to distinguish lands patented to one person or another person, without regard to the kind of an entry that the patent was issued under. (R. 133.)

Mr. LILJEQVIST. Your Honor, in connection with Plaintiff's Exhibit 21, the plat or map, showing the patentees around Malheur, Mud, and Harney Lakes and the Narrows, I will state that it is stipulated between the Government and the State of Oregon that the Government has copies of all these patents, the names of the patentees being projected and placed on Exhibit 21, and for the purposes of shortening the record typical samples of each kind of grant and patent as shown upon Plaintiff's Exhibit 21 have been prepared and compared by the Government's attorneys, and the State of Oregon offers it in evidence, your Honor, as Exhibit X–5.

SPECIAL MASTER. It will be admitted into evidence.

(Thereupon the said document was by the reporter marked Defendant's Exhibit X–5.)

Mr. LILJEQVIST. There is no patent or grant that did not take one of these forms.

Now, your Honor, I think it would be conducive to clarity in the record if I would explain to your Honor that the form of reservation, and the only form of reservation, contained in all these grants around these lakes [illegible] the meander line——

SPECIAL MASTER. I understand you, it is perfectly agreeable to me to have you explain it, but I understand your (R. 2346) position to be that the Government did not reserve immunity from the law of

reliction prescribed by the State in (R.2347) similar circumstances, and could not claim that it was not governed by the law of the State respecting private proprietorship.

Mr. LILJEQVIST. And did not reserve any title at all below the meander line of any nature.

SPECIAL MASTER. Yes, I understand your position fully, Mr. Liljeqvist.

Mr. LILJEQVIST. And that by reason of the issuance of these patents and grants, if the Government had any claim since the State of Oregon was admitted into the Union, it thereby lost all right, title and interest or estate in the lake bed lands involved in this suit.

SPECIAL MASTER. Provided its loss was determined by judicial decision or statutory enactment of the State of Oregon. Isn't that your position?

Mr. LILJEQVIST. I did not quite follow that.

SPECIAL MASTER. As I understand it, the Federal Government lost everything below its line through reliction and the like, if that is the local law, either established by decision or statute.

Mr. LILJEQVIST. Yes, sir. And by the issuance of these patents and grants in the forms of which Defendant's Exhibits X–5 are types, the Government thereby conclusively took the position, as a matter of law, that the effect of its conveyance upon the meander line should be determined in accordance (R. 2347) with the (R. 2347) laws of the State of Oregon, and that thereby the title below the meander line became either the property of the State of Oregon or of the riparian owners in accordance with such law as the State of Oregon should declare, either by judicial decision or constitutional and valid statutes. This is our position.

SPECIAL MASTER. I understand that. (R. 2348.)

aa. Defendant's Exhibit X–5, Typical Samples of United States Grants and Patents

COPY OF DEFENDANT'S EXHIBIT X–5

Defendant's Exhibit X–5 reads as follows:

Selection No. 2489

The United States of America,

To all to whom these presents shall come, greeting:

Whereas, Miller and Lux, being the owner of a tract of land described as follows: The southeast quarter of section thirteen and the west half of the northeast quarter of section fourteen in township twenty-eight south of range thirty-one east of Mount Diablo meridian in California, containing two hundred and forty acres, situated and included within the limits of a public forest reservation, known and officially designated as the Sierra Forest Reserve, in the State of California, has, under the provisions of the act approved June 4, 1897, entitled "An act making appropriations for

sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," reconveyed and relinquished the said tract to the United States and has, under the provisions of said act, selected in lieu thereof the following described tract of vacant public land now open to settlement, to wit: The south half of the northeast quarter of section thirteen in township twenty-five south of range thirty-one east and the north half of the southwest quarter and the northwest quarter of the southeast quarter of section eight and the northwest quarter of the northwest quarter of section twenty-six in township twenty-five south of range thirty-two east of Willamette meridian in Oregon, containing two hundred and forty acres.

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the aforesaid act, have given and granted, and by these presents do give and grant unto the said Miller and Lux, and to their successors, the lands last above described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Miller and Lux, and to their successors and assigns forever. And there is reserved, from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the thirty-first day of January, in the year of our Lord, one thousand nine hundred and three, and of the independence of the United States the one hundred and twenty-seventh.

By the President:

T. ROOSEVELT,
By F. M. MCKEAN, *Sec.*
C. W. BRUSH,
Recorder of the Gen. Land Office.

The United States of America:
To all to whom these Presents shall come, Greeting:

Certificate No. 425.

Whereas Charles Marion Harvey of Grant County, Oregon, has deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Lakeview, Oregon, whereby it appears that full payment has been made by the said Charles Marion Harvey, according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the Public Lands," and the acts supplemental thereto, for the Lot numbered three of section two in Township twenty-six South of Range thirty-one East of Willamette Meridian in Oregon containing one hundred and sixty-one acres and fifteen

hundredths of an acre, according to the Official Plat of the Survey of the said Lands, returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Charles Marion Harvey.

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said Charles Marion Harvey, and to his heirs, the said Tract above described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Charles Marion Harvey and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of September, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

By the President:

BENJAMIN HARRISON,
By M. MCKEAN, *Sec.*
J. R. CONWELL, *Rec.*

4–774a.

The United States of America,

To all to whom these presents shall come, Greeting:

Timber-Culture Certificate No. 78.
Application 1125.

Whereas there has been deposited in the General Land Office of the United States a certificate of the Register of the Land Office at Burns, Oregon, whereby it appears that, pursuant to the Acts of Congress approved March 3, 1873, March 13, 1874, and June 14, 1878, "to encourage the growth of timber on the Western Prairies," the claim of Porter Sylvester, has been established and duly consummated in conformity to the law, for the North West quarter of Section thirteen in Township twenty-five South of Range thirty-two and one half of East of Willamette Meridian in Oregon, containing one hundred and sixty acres, according to the Official Plat of the Survey of the said Lands, returned to the General Land Office by the Surveyor General:

Now know ye, that there is therefore granted by the United States unto the said Porter Sylvester, the tract of land above described, To Have and to Hold the said tract of land, with the appurtenances thereof, unto the said Porter Sylvester, and to his heirs and assigns forever; subject to any vested and accrued water rights and mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fifteenth day of May in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States, the one hundred and twenty-seventh.

By the President:

T. ROOSEVELT,
By F. M. MCKEAN, *Sec.*
C. W. BRUSH, *Rec.*

4-407a-ty.

The United States of America,

To all to whom these presents shall come, greeting: Certificate No. 932.

Whereas, Frank M. Jordan, has deposited in the General Land Office of the United States a certificate of the register of the Land Office at Burns, Oregon, whereby it appears that full payment has been made by the said Frank M. Jordan, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the public lands," and the acts supplemental thereto, for the lot four of section three and the southeast quarter of the northeast quarter and the lots nine and ten of section four in township twenty-six south of range thirty-two east of the Willamette meridian (north of Malheur Lake), Oregon, containing one hundred forty-eight and twenty-three hundredths acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Frank M. Jordan:

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Frank M. Jordan, and to

his heirs, the said tract above described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Frank M. Jordan, and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-second day of August, in the year of our Lord one thousand nine hundred and seven and of the Independence of the United States the one hundred and thirty-second.

By the President:

THEODORE ROOSEVELT.
By F. M. McKEAN, *Sec.*
H. W. SANFORD, *Rec.*

Burns 05566 4–1028–R

The United States of America,

To all to whom these presents shall come, greeting:

Whereas, a Certificate of the Register of the Land Office at Burns, Oregon, has been deposited in the General Land Office, whereby it appears that, full payment has been made by the claimant Charles V. Reed according to the provisions of the act of Congress approved March 3, 1891, entitled "An act to provide for the sale of desert lands in certain States and territories," as amended by the act of March 3, 1891, and supplemented by the act of March 4, 1915, for the west half of the northeast quarter of section twelve in township twenty-six south of range thirty-one east of the Willamette meridian, north of Malheur Lake, Oregon, containing eighty acres, according to the official plat of the survey of the said land, returned to the General Land Office by the surveyor general:

Now know ye, That the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, has given and granted, and by these presents does give and grant, unto the said claimant, and to the heirs of the said claimant, the tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto be-

longing, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I Warren G. Harding, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. Given under my hand, at the city of Washington, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the United States, the one hundred and forty-seventh.

By the President:

WARREN G. HARDING,
By VIOLA B. PUGH, *Sec.*
WM. P. LEROY,
Recorder of the Gen. Land Office.

Record of patents: Patent Number 884409.

The United States of America,
To all to whom these present shall come, Greeting:

Whereas, the Aztec Land and Cattle Company, Limited, being the owner of a tract of land described as follows: The northeast quarter of the southeast quarter of section three in township fifteen north of range eleven east of Gila and Salt River meridian in Arizona, containing forty acres, situated and included within the limits of a public forest reservation known and officially designated as the San Francisco Mountains Forest Reserve, in Arizona has under the provisions of the act approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," reconveyed and relinquished the said tract to the United States, and has under the provisions of said act, selected in lieu thereof the following-described tract of vacant public land now open to settlement, to wit: The lot numbered eleven of section four in township twenty-seven south of range thirty east of Willamette meridian in Oregon, containing thirty-nine acres and ninety-seven hundredths of an acre.

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the aforesaid act, have given and granted, and by these presents do give and grant unto the said Aztec Land and Cattle Company, Limited, and to its successors, the lands last above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurte-

nances, of whatsoever nature thereunto belonging, unto the said Aztec Land and Cattle Co., Limited, and to its successors and assigns forever. And there is reserved, from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the twenty-second day of June in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth;

By the President:

T. ROOSEVELT,
By F. M. MCKEAN, *Sec.*
C. W. BRUSH, *Rec.*

The United States of America,
To all to whom these presents shall come, greeting:
Burns 0143

Whereas, John F. Oakerman, being the owner of a tract of land situated and included within the limits of a public forest reservation, known and officially designated as the San Bernardino Forest Reserve, California, has, under the provisions of the act approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," reconveyed and relinquished the said tract to the United States and has, under the provisions of said act, selected in lieu thereof the following-described tract of vacant public land now open to settlement, to wit: The lots nine and ten of section four in township twenty-seven south of range thirty east of the Willamette Meridian, Oregon, containing seventy-nine and seventy-six hundredths acres;

Now know ye, that the United States of America, in consideration of the premises, have given and granted, and by these presents do give and grant onto the said John F. Oakerman and to his heirs, the land above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said John F. Oakerman and to his heirs and assigns forever. And there is reserved, from the lands hereby granted a right of way thereon for ditches or canals constructed by authority of the United States.

This patent is issued in lieu of one dated November 16, 1908, which has been canceled because of an error in the name of the patentee.

In testimony whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-second day of March, in the year of our Lord one thousand nine hundred and nine and of the independence of the United States the one hundred and thirty-third.

By the President:

WM. H. TAFT,
By M. W. YOUNG, *Sec.*
By H. W. SANFORD, *Rec.*

Burns 06013 4–1023–R.

The United States of America,

To all to whom these presents shall come, greeting:

Whereas, a certificate of the register of the land office at Burns, Oregon, has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant Charles E. Dillman according to the provisions of the act of Congress of April 24, 1820, entitled "An Act making further provision for the sale of the public lands" and the acts supplemental thereto, for the northeast quarter of the southwest quarter, the southeast quarter of the northwest quarter, the southwest quarter of the northeast quarter, and the northwest quarter of the southeast quarter of section fourteen in township twenty-six south of range thirty-one east of the Willamette Meridian, north of Malheur Lake, Oregon, containing one hundred sixty acres, according to the official plat of the survey of the said land, returned to the General Land Office by the surveyor general;

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, has given and granted, and by these presents does give and grant, unto the said claimant and to the heirs of the said claimant the tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. Given under my hand, at the city of Washington, the ninth day of April,

in the year of our Lord one thousand nine hundred and fourteen, and of the independence of the United States the one hundred and thirty-eighth.

By the President:

WOODROW WILSON,
By M. P. LEROY, *Sec.*
By L. Q. C. LUMAR, *Rec.*

Record of patents: Patent number 397295.

Division K 4-297a B-4

Oregon

Swamp and Overflowed Lands

Approved Sept. 19, 1889

List No. 10, District of Lakeview

Memorandum

Approval noted on selection records by S. R. E., clerk	Sept. 26, 1889
Approval noted on tract books by G. B. C., clerk	Sept. 30, 1889
Patent No. 8 Lakeview, 1 Burns issued	Mar. 10, 1890

(Here follows description of lands.)

Aggregate area 9,958:64

GENERAL LAND OFFICE,
SWAMP LAND DIVISION, *August 20, 1889.*

This certifies that the tracts of land described in the foregoing list, aggregating nine thousand, nine hundred and fifty-eight 64/100 acres (9,958: 64) are claimed as swamp and overflowed land innuring the State of Oregon under the provisions of the act of Congress approved September 28, 1850, as extended to said State by the act of March 12, 1860, that the character of the same as swamp and overflowed land is established by the joint report of George F. Elliott, special agent of the General Land Office, and C. L. Richmond, agent of the State, made under oath, November 14, 1887; that upon examination of the tract books of this office the claim of the State to said tracts is found free from sales or other claims; and that under date of July 12, 1889, the Register of the U. S. Land Office at Lakeview, Oregon, reported that no claims adverse to that of the State for the tracts aforesaid appeared of record in his office.

SAM R. EDWARDS,
Examining Clerk.
L. T. PIERCE,
Acting Chief of Swamp Land Division.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Aug. 20, 1889.*

The foregoing list of swamp and overflowed lands, containing nine thousand, nine hundred and fifty-eight acres and sixty-four hundredths of an acre (9,958.64) is respectfully submitted to the Secretary of the Interior and the approval of the same recommended.

W. H. STONE,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
Sept. 19, 1889.

The foregoing list of swamp land selections, containing nine thousand, nine hundred and fifty-eight acres and sixty-four hundredths of an acre (9,958.64) is hereby approved subject to any valid rights that may exist to the tracts of land therein described.

JOHN W. NOBLE, *Sec.*

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Oregon—Burns

List No. 5

School Indemnity Selections

Embracing 1600 acres

Approved March 14, 1903

Copies transmitted to Governor and R. & R. March 28, 1903.
Posted May 29, 1903.
Copy ackg. by Gov. (A. C. B.) April 2, 1903–62092.
Copy ackg. R. & R. April 3, 1903–63385. (4–309).
Approved List No. 5 of school indemnity lands.

Exhibiting the tracts of public lands situated in the district of lands subject to sale at Burns, Oregon, which have been selected for the support of schools in certain townships and fractional townships where the full amount of school lands to which such townships are entitled have not been granted in place, and which selections are provided for in the acts of Congress approved January 7, 1853 (10 Stat., 150), February 14, 1859 (11 Stat., 383), and by sections 2275 and 2276, U. S. Revised Statutes as amended by the Act of February 28, 1891. (26 Stat., 796.)

(Here follows description of lands).

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 26, 1903.

It is hereby certified that the tracts described in this list are embraced in the original lists now on file in this office of lands selected

by the State of Oregon pursuant to the laws of said State, in the Burns (Harney) land district, as indemnity for losses in the sections and townships named, which school land indemnity selections are authorized by the acts of Congress above cited.

It is further certified that the lands reported lost or deficient in said list, and those selected in lieu thereof, have been examined and compared with the township plats and tract books in this office; that the indemnity lands claimed have been found to be properly due the townships for which they were selected; and that the selected lands are shown to be subject to such selection, being unappropriated surveyed public lands, not mineral in character within the limits of said State, and free from adverse claims of record.

It is, therefore, recommended that the said list, embracing one thousand six hundred acres, be approved subject to any valid interfering rights existing at date of selection.

W. A. RICHARDS,
Commissioner.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., March 14, 1903.

The foregoing list of selections embracing one thousand six hundred acres is hereby approved subject to any valid interfering rights existing at date of selection.

E. A. HITCHCOCK, *Secretary.*

Burns, Oregon

List No. 3

School Land Indemnity Selections

Embracing 4,854.95 acres

Approved February 20, 1899

Copies transmitted to Governor and R. & R. March 2, 1899.
Ackg. by Governor March 11, 1899—37856.
Ackg. by R. & R. March 22, 1899—37380.
Posted March 9, 1899, J. E. W.

Approved List No. 2 of School Indemnity Lands

Exhibiting the tracts of public lands situated in the district of lands subject to sale at Burns, Oregon, which have been selected for the support of schools in certain townships and fractional townships where the full amount of school lands to which such townships are entitled have not been granted in place, and which selections are provided for in the acts of Congress approved January

7, 1853 (10 U. S. Stat., p. 150), February 14, 1859 (11 U. S. Stat. p. 383), and by sections 2275 and 2276, U. S. Revised Statutes. (Here follows description of lands.)

GENERAL LAND OFFICE,
Washington, D. C., January 31, 1899.

The tracts described in the foregoing list have been carefully examined and have been found to be free from conflicts and to inure to the State of Oregon for the purpose stated.

Approved: I. R. CONWELL, *Chief of Division.*

M. V. BURR,
JAMES RERVEN,
Examiners.

MINERAL DIVISION,
February 8, 1899.

This certifies that the tracts selected herein are not in conflict with mining claims of record in this office; that some of the tracts have been published under the circular of July 9, 1894, without protest or objection, and that the remaining tracts are not in townships containing mining claims.

Approved: H. B. PORTER, *Chief of Division.*

C. A. HOLLINGSWORTH,
Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Feb. 17, 1899.

It is hereby certified that the tracts described in the foregoing list are embraced in the original lists now on file in this office, of land duly selected in the land district of Burns, Oregon, as indemnity for deficiencies in lands in the sections and townships named; which school land indemnity selections are authorized by the acts of Congress of Jan. 7, 1853 (10 U. S. Stat., 150), Feb. 14, 1859 (11 U. S. Stat., 383), and by sections 2275 and 2276, U. S. Revised Statutes.

It is further certified that the tracts reported lost or deficient in said list and those selected in lieu thereof have been examined and compared with the township plats and tract books of this office; that the indemnity land claimed has been found to be properly due the townships for which it was selected; and that the selected land is shown to be subject to such selection, being surveyed agricultural land, nonmineral in character, and free for adverse claims.

It is therefore recommended that the selection of said tracts containing four thousand eight hundred and fifty-four acres and ninety-five hundredths of an acre, be approved, subject to any valid interfering rights which may have existed at the date of selection.

HERMANN—*Commissioner.*

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Feb. 20, 1899.

The selections embraced in the foregoing list containing four thousand eight hundred and fifty-four acres and ninety-five hundredths of an acre, are hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

THOS. RYAN,
Acting Secretary.

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Oct. 15, 1916.

Whereas, by the act of Congress approved July 2, 1864 (13 Stat. 365), entitled "an act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route;" and the joint resolution of May 31, 1870 (16 Stat. 378), there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and branch, to the Pacific coast, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad (line), as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims of rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the General Land Office;" and

Whereas, it is further provided that "whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections;" and

Whereas, official statements from the Secretary of the Interior have been filed in the General Land Office showing that the commissioners appointed by the President, under the provisions of the fourth section of the first-named act, have reported to him that the said Northern Pacific Railroad and Telegraph Line and Branch, excepting that portion between Wallula, Washington, and Portland, Ore-

gon, declared forfeited by the act of September 29, 1890 (26 Stat. 496), have been constructed and fully completed and equipped in the manner prescribed by the act relative thereto, and the same accepted; and

Whereas, there has been filed in the office of the Secretary of the Interior evidence showing that the Northern Pacific Railway Company is the lawful successor in interest to the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the act of July 2, 1864 (13 Stat. 365), and all subsequent legislation; and

Whereas, by the act of Congress approved July 1, 1898 (30 Stat. 597-620), authority is given the Northern Pacific Railroad Company or its successors in interest, under certain conditions expressed therein, to relinquish to the United States, certain lands, within either the granted or indemnity limits of its grant, and to select in lieu thereof, "an equal quantity of public lands, surveyed or unsurveyed, and not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted;" and

Whereas, the following-described lands have been selected by the duly authorized agent of the Northern Pacific Railway Company under the provisions of the act of July 1, 1898, aforesaid, and the lands given as bases therefor are within the limits of the grant, lie opposite the constructed line of the company's road, and have been relinquished by the proper parties in interest and the relinquishments duly accepted, as follows, to wit:

North and south of base line and east of Willamette Meridian, Oregon.

(Description of land follows.)

Railroad Grants and Right of Way Division Oct. 15, 1916

It is hereby certified that the foregoing list has been examined in connection with the plats and records of this office and that the selected tracts therein described are vacant and unappropriated public lands and subject to approval and patent to the Northern Pacific Railway Company, under the act of July 1, 1898 (30 Stat. 597-620), and the tracts specified as bases for the tracts selected have been relinquished by the proper parties in interest and the relinquishments duly accepted, and they have not heretofore been used as bases for any approved selections.

It is further certified that the foregoing selected lands have been reported on by the Geological Survey as being non-mineral in character and as having no valuable power-site or reservoir possibilities.

G. J. PILLOW,
Examiner.

Approved: F. R. DUDLEY,
Chief of Division.

ACCOUNTS DIVISION,
Nov. 6, 1916.

Expense of survey and office work on land described in the foregoing list:

Railroad selections	688.82 acres
Field work	$28.57
Office work at 1¢ per acre	6.89
Total	35.46

Act June 25, 1910 not involved:

FREDERIC NEWHIEGH,
Chief of Division.

Now, therefore, as it has been found on a careful examination in connection with the authenticated map on file in the General Land Office of the survey of the Northern Pacific Railroad route, that the foregoing relinquished lands fall within the limits established upon said route, and that the foregoing selected lands, so far as the returns to the General Land Office show, are free from conflict, it is hereby recommended that the said selected lands, covering six hundred and eighty-eight acres and eighty-two hundredths of an acre, be approved and carried into patent, as lands falling within the grant by the acts aforesaid, and inuring to the said Northern Pacific Railway Company, the patent to contain a reservation according to the proviso to the act of August 30, 1890 (26 Stat., 391).

C. L. BRUCE,
Acting Commissioner.

To the honorable Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Nov. 14, 1916.

Approved; covering six hundred and eighty-eight acres and eighty-two hundredths of an acre.

B. O. SWEENEY,
First Assistant Secretary of the Interior.

'B' List 450 Pat. No. 556399, Nov. 28, 1916.

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Record of Patents

4–401M–tyr.

The United States of America,
To all to whom these presents shall come, greeting:

Whereas by the act of Congress, approved July 2, 1864, entitled "an act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast, by the northern route," and the joint resolution of May 31,

1870, there was granted to the Northern Pacific Railroad Company, its successors, and assigns, for the purpose of aiding in the construction of said railroad and telegraph line and branch to the Pacific coast, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emption, or other claims, or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and

Whereas it is further provided that "whenever prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections"; and

Whereas official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the commissioners appointed by the President, under the provisions of the fourth section of the first named act, have reported to him that the said Northern Pacific Railroad and telegraph line and branch, excepting that portion between Wallula, Washington, and Portland, Oregon, declared forfeited by the act of September 29, 1890, have been constructed and fully completed and equipped in the manner prescribed by the act relative thereto, and the same accepted by the President; and

Whereas there has been filed in the office of the Secretary of the Interior evidence showing that the Northern Pacific Railway Company is the lawful successor in interest of the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the act of July 2, 1864, and all subsequent legislation; and

Whereas by the act of Congress approved July 1, 1898 (30 Stat., 597–620), authority is given the Northern Pacific Railroad Company, or its successors in interest, under certain conditions expressed therein, to relinquish to the United States certain lands within either the granted or indemnity limits of its grant and to select in lieu thereof, "an equal quantity of public lands, not mineral or reserved and not valuable for stone, iron, or coal, and free from valid adverse claims or not occupied by actual settlers, at the time of such selection, situated within any State or Territory into which such railroad grant extends," and it is provided that "patents shall issue for the land so selected as though it had been originally granted"; and

Whereas, by the act of Congress approved May 17, 1906 (34 Stat. 197), the provisions of the act of July 1, 1898, aforesaid, were extended to include any bona fide settlement of entry made subsequent to January 1, 1898, and prior to May 31, 1905, in accordance with the erroneous decision of the Land Department respecting the withdrawal on general route of the Northern Pacific Railroad between Wallula, Washington, and Portland, Oregon, where the same has not since been abandoned but restricted lieu selections to the State where the private holdings are situated; and

Whereas the following described lands have been selected by the duly authorized agent of the Northern Pacific Railway Company under the provisions of the act of July 1, 1898, as extended by the act of May 17, 1906, aforesaid, and the lands given as bases therefor are within the limits of the grant, lie opposite the constructed line of the company's road and have been duly relinquished to the United States, in accordance with the requirements of said acts, and the relinquishment accepted by the Secretary of the Interior, viz (here follows description of the lands);

Now know ye, that the United States of America, in consideration of the premises, and pursuant to the said acts of Congress, have given and granted, and by these presents do give and grant unto the said Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, its successors and assigns, the tracts of land selected as aforesaid and embraced in the foregoing to have and to hold the said tracts with the appurtenances thereof, unto the said Northern Pacific Railway Company, successor as aforesaid, and to its successors and assigns forever.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the nineteenth day of March, in the year of our Lord one thousand nine hundred and eight and of the independence of the United States the one hundred and thirty-second.

By the President:

THEODORE ROOSEVELT,
By M. W. YOUNG, *Sec.*
H. W. SANFORD, *Rec.*

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Lakeview

List No. 6

of

Indemnity school-land selections made by the State of Oregon, in the Lakeview land district, under the provisions of the acts of Congress approved Jan. 7, 1853, and Feb. 14, 26, 1859, embracing

tracts of an aggregate area of 39,946.04 acres. Approved March 26, 1891. (39.194.)

Copies sent to the governor and R. & R. April 17, 1891.

Receipt acknowledged by the governor April 28, and by the R. & R. April 25, 1891—and 57.285.

List No. 6 of indemnity school selections, exhibiting the tracts of public lands situated in the district of lands subject to sale at Lakeview, Oregon, which have been selected for the support of schools in certain townships and fractional townships where the full amount of school lands to which such townships are entitled have not been granted in place, and which selections are provided for in the act of Congress approved Jan. 7, 1853, entitled an "Act to amend an act and an act approved Feb. 14, 1859, entitled an act for the admission of Oregon into the Union and the act approved Feb. 26, 1859," entitled, "An act to authorize settlers upon sixteenth and thirty-sixth sections, who settled before the survey of the public lands to preempt their settlements."

(Here follows description of lands----------)

Total amount 3,994,604.

GENERAL LAND OFFICE,
Washington, D. C., March 23, 1891.

The tracts described in the foregoing list have been carefully examined and are found to be free from conflicts and to inure to the State of Oregon for the purposes indicated.

J. J. BARNES,
Examining Clerk.

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 24, 1891.

It is hereby certified that the tracts described in the foregoing list are embraced in the original lists now on file in this office, of lands selected in the Lakeview district, Oregon, by a duly authorized agent of said State, as indemnity for deficiencies in school lands in the sections and townships named, which indemnity selections are authorized by the acts of Congress approved January 7, 1853 (10 U. S. Stat. 150), Feb. 14, 1859 (11 U. S. Stat. 383), and Feb. 26, 1859 (11 U. S. Stat. 385), Secs. 2275 and 2276 (Rev. Stat.)

It is further certified that the tracts reported lost or deficient and those selected in lieu thereof have been examined and compared with the township plats and tract books of this office; that the indemnity lands claimed are found to be properly due the townships for which they were selected; and that the selected lands are shown to be subject to such selection, being surveyed agricultural lands, nonmineral in character, and free from adverse claims, it is, therefore, recommended that the said list, embracing thirty-nine thousand, nine hundred and forty-six and four hundred[illegible] (39,946.04) acres,

be approved, subject to any valid interfering rights which may have existed at the date of selection.

W. M. STONE,
Signed by Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 26, 1891.

The foregoing list of the State of Oregon school indemnity selections embracing thirty-nine thousand nine hundred and forty-six and four hundredths (39,946.04) acres is hereby approved subject to any valid interfering rights which may have existed at the date of selection.

JOHN W. NOBLE,
Sec.

4-297

Division K.

Oregon
Swamp and Overflowed Lands
Approved Jan. 19, 1891
List No. 2, District of Burns

A list of swamp and overflowed lands, selected by the State of Oregon, under the provisions of the act of Congress approved March 12, 1860, in the land district of Burns, Oregon, containing 569.50 acres.

Certified copy sent to the register and the receiver, Feb. 6, 1891.
R. and R. report no conflict, Feb. 14, 1891.
Certified copy sent to the governor, Feb. 6, 1891.
Approval noted on selection records, Jan. 26, 1891.
Approval noted on tract books, Jan. 26, 1891.
The governor requested patent by letter dated Feb. 17, 1891.
Patent No. 3 issued March 12, 1891.
* Patent No. 3 posted on selection record, March 13, 1891.
Notice sent of issue of patent to the register and the receiver, March 14, 1891.
R. and R. notice of noting patent on record dated March 23, 1891.
The governor acknowledged receipt of patent by letter dated March 25, 1891.
(Here follows description of the land --------)

GENERAL LAND OFFICE,
DIVISION OF SWAMP LANDS,
Washington, D. C., Dec. 23, 1890.

This certifies that the tracts of land described in the foregoing list, aggregating five hundred and sixty-nine acres and fifty-hundredths of an acre (569.50), are claimed as swamp and overflowed land, inuring to the State of Oregon under the provisions of the act of Con-

gress approved Sept. 28, 1850 (9 U. S. Stat. 519), as extended to said State by act of March 12, 1860 (12 U. S. Stat. 3); that the character of the same as swamp and overflowed land is established by the joint report of agents of this office and of the State; that upon examination of the tract books of this office the claim of the State to said lands is found free from conflict by sales or other claims, and that, under date of December 10, 1890, the register of the district land office at Burns, reported that no claims adverse to that of the State for the tracts aforesaid appeared of record in his office.

SAM'L. W. SNOW,
Examining Clerk.
EDMOND MALLET,
Chief of Division.

GENERAL LAND OFFICE,
Washington, D. C., Dec. 26, 1890.

The foregoing list of swamp-land selections, containing five hundred and sixty-nine acres and fifty-hundredths of an acre (569.50), is hereby approved subject to any valid rights that may exist to the tracts of land therein described.

JOHN W. NOBLE,
Secretary.

GENERAL LAND OFFICE,
Washington, D. C., Dec. 26, 1890.

The foregoing list of swamp and overflowed lands, containing five hundred and sixty-nine acres and fifty-hundredths of an acre (569.50) is respectfully submitted to the Secretary of the Interior and the approval of the same recommended.

COMMISSIONER.

*Patent No. 3 transmitted to the governor, March 14, 1891.

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The United States of America,
To all to whom these presents shall come, greeting:

Homestead certificate No. 512.
Application 209.

Whereas, there has been deposited in the General Land Office of the United States a certificate of the register of the land office of the city of Burns, Oregon, whereby it appears that, pursuant to the act of Congress approved 20th May, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Alexander McKenzie has been established and duly consummated, in conformity to law, for the east half of the southwest quarter and the lots numbered three and four of section twenty-three in township twenty-six south of range thirty-one east

of Willamette Meridian, north of Malheur Lake in Oregon, containing one hundred and seventy-three acres and sixty-five hundredths of an acre, according to the official plat of the survey of said land, returned to the General Land Office by the surveyor general.

Now know ye that there is, therefore, granted by the United States unto the said Alexander McKenzie, the tract of land above described: To have and to hold the said tract of land with the appurtenances thereof, unto the said Alexander McKenzie and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law, and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, William McKinley, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twelfth day of December, in the year of our Lord one thousand eight hundred and ninety-eight, and of the independence of the United States the one hundred and twenty-third.

By the President:

WILLIAM MCKINLEY,
By F. W. MCKEAN, *Sec.*
C. H. BRUSH, *Rec.*

Burns 03964.

The United States of America.

To all to whom these presents shall come, greeting:

Whereas, a certificate of the register of the land office at Burns, Oregon, has been deposited in the General Land Office, whereby it appears that, pursuant to the act of Congress of May 20, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of John E. Harper, assignee of Lizzie Boyd, widow of Robert Boyd, has been established and duly consummated, in conformity to law, for the lot three of section twenty-five in township twenty-six south of range thirty east of the Willamette meridian, south of Malheur Lake, Oregon, containing thirteen and fifty-hundredths acres, according to the official plat of the survey of the said land, returned to the General Land Office by the surveyor general:

Now know ye that there is, therefore, granted by the United States unto the said claimant the tract of land above described;

to have and to hold the said tract of land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights, for mining, agricultural, manufacturing or other purposes and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. Given under my hand, at the city of Washington, the twenty-sixth day of June, in the year of our Lord, one thousand nine hundred and eleven and of the independence of the United States the one hundred and thirty-fifth.

By the President:

WM. H. TAFT,
By W. P. LEROY, *Sec.*
H. W. SANDFORD, *Rec.*

h. Plaintiff's Exhibit No. 22

Mr. CHESTER W. PECORE, recalled as a witness for plaintiff, testified in substance as follows:

Plaintiff's Exhibit No. 22 is a status diagram showing the present ownership of the lands around Malheur, Mud, and Harney Lakes, within the red (R. 133) line or between the red line and the meander line of the lakes (according to the county assessment rolls); the lands which are not colored within the red lines are Government lands, and the colors on the map are simply to distinguish between the lands owned by different parties; they have no other significance. (R. 134.)

The only difference between Plaintiff's Exhibit No. 21 and Plaintiff's Exhibit No. 22 is that on the latter map there are shown some fences which bound the lands in the possession of various parties in the lake beds, and on Plaintiff's Exhibit No. 21 we have delineated the locations of the original patents, and on Plaintiff's Exhibit No. 22 the present ownership (according to the county assessment rolls). (R. 136.)

2. Map prepared by Cooper & Dodge in 1914

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

In my work around Malheur Lake I did not check a map prepared by Cooper & Dodge presumed to have been made in February, 1914; and I do not remember having a copy of it. (R. 2254.)

3. Malheur Gap

a. Elevations

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, on recross-examination testified in substance as follows:

I have examined some of the early maps accompanying reports of Government surveyors, or inspection reports, and I noticed that some of them show Malheur River flowing from these lakes on east into the Snake River. I have an elevation of Malheur Gap at Hat Butte, to which point we ran our elevation. (NOTE.—The lowest elevation found by Mr. Pecore at Malheur Gap is shown on the map, Plaintiff's Exhibit No. 48, used by the Special Master. (R. 2331.) It is east of a road running from Waverley and toward Indian Creek. It is southeast of the most easterly corner of Malheur Lake, or southeast from the southeast corner of section 23, T. 26 S., R. 33 E., south of the lake, a distance of about six miles, or practically due east of Voltage, a distance of about thirteen miles, as shown on the map used by the Special Master. (R. 2331–2332.) We ran our levels as far up as Hat Butte. (R. 2332.) I do not know whether that is the lowest elevation point of Malheur Gap.

The highest elevation point we found at the north side of Hat Butte is 4,108 or 4,109 feet. If 4,108, that would be fifteen feet above elevation 4,093 feet. (R. 2333.)

The Government maps that I saw showing that stream flowing easterly were the maps which accompanied the reports of the Surveyor General of Oregon to the Commissioner of the Land Office; those maps showed clearly that the public land surveys had not reached within thirty to fifty miles. (R. 2333) of that area at that time, and if they had not been closer than that, the Surveyor General was simply guessing at what he put on the map.

Malheur River is east of Malheur Gap.

If Malheur Lake rose high enough for that fifteen feet, or from 4,093 to 4,108, it would have a stream that would go through Malheur Gap into Malheur River. (R. 2334.) It would have reached Malheur Gap before it got within two feet of the elevation of 4,110 at the Sand Reef.

There was a geologist of the United States Biological Survey in this country this summer, who was working in that area from Hat Butte east, and I requested him to examine the south fork of Malheur River to determine if there was any possibility of a river having run down there lately. He did examine it and replied to me, after examination, that in his opinion there was no water running down through Malheur Gap within the last five hundred years. If the Army engineers made this report of the maps put in evidence, those engineers must have found Malheur Lake fifteen feet higher than 4,093 feet, to have Malheur Lake flow into Malheur River. (R. 2335.)

4. Areas of Malheur, Mud, and Harney Lakes—Plaintiff's Exhibit 55

UNITED STATES DEPARTMENT OF AGRICULTURE,
BUREAU OF BIOLOGICAL SURVEY,
Burns, Oregon, November 21, 1931.

Mr. R. S. COLLINS,
Attorney, Dept. of Justice,
Burns, Oregon.

DEAR MR. COLLINS:

With reference to Mr. Blackmar's request for a statement of the areas of Malheur, Mud, and Harney Lakes, for the record in the case United States v. Oregon, please be advised that the areas shown by the Government's Exhibits Nos. 3 and 4, as determined by planimeter are as follows:

Malheur Lake

Total area 47,850 acres, or approximately 74.8 square miles.

Area west of a line running north from Sod-house spring, 11,400 acres, or approximately 17.8 sq. miles.

Area east of a line running north from Sod-house spring, 36,450 acres, or approximately 57.0 sq. miles.

Harney Lake

Total area 32,100 acres, or approximately 50.2 square miles.

Mud Lake

Total area 1,200 acres, or approximately 1.9 square miles.

The above areas are within the Neal or other subsisting meander lines of the lakes. Between the Neal meander line and the so-called meander line of 1877 is an area of 25,280 acres or approximately 39.5 square miles.

Very truly yours,

(Signed) CHESTER W. PECORE,
Cadastral Engineer.

5. Areas above water surface at certain elevations—Plaintiff's Exhibit 55

BURNS, OREGON,
March 8, 1932.

Hon. CHAS M. BLACKMAR,
Special Assistant to Attorney General,
906 Commerce Bldg., Kansas City, Mo.

DEAR MR. BLACKMAR:

With reference to your letter of February 27, 1932, requesting information as to various areas within the meander lines of Malheur

and Mud lakes, Oregon, please be advised that the following areas have been obtained by planimeter from our topographic maps of the lake beds:

Areas within Neal Meander Line of Malheur Lake, East of Narrows Bridge

Above	4,093	foot	contour	line	8,000	acres
"	4,094	"	"	"	1,985	"
"	4,095	"	"	"	655	"
"	4,096	"	"	"	190	"

Areas within Neal Meander Line of Mud Lake, between East base of Sand Reef to Narrows Bridge

Above	4,093	foot	contour	line	770	acres
"	4,094	"	"	"	525	"
"	4,095	"	"	"	240	"
"	4,096	"	"	"	150	"

Areas of Cole Island

Above	4,093	foot	contour	line	350	acres
"	4,094	"	"	"	135	"
"	4,095	"	"	"	10	"
"	4,096	"	"	"	0	"

Areas of Pelican Island

Including an island which contains 100 acres above the 4,093-foot contour line and lies southwest of Dunn's well, and 2¼ miles north of the center of the north meander line of lot 8, Section 17, T. 26 S., R. 33 E.

Above	4,093	foot	contour	line	840	acres
"	4,094	"	"	"	425	"
"	4,095	"	"	"	270	"
"	4,096	"	"	"	140	"

There are also being obtained by planimeter the areas outside of the Neal meander line of Malheur and Mud Lakes and within the area covered by our topographic surveys, as shown upon Exhibit 4, which will be covered by the waters of the lakes at the elevations indicated above. These data will be forwarded to you as soon as our computations are completed. It appears that when the waters of the lakes reach an elevation of 4,094 feet, approximately 7,500 acres of lands outside the Neal meander line will be flooded, and at elevations of 4,095 feet and 4,096 feet the area inundated will be much greater than this.

A copy of this letter is being forwarded to Mr. Collins at Marshfield, Oregon.

Very truly yours,

(Signed) CHESTER W. PECORE,
Cadastral Engineer.

BURNS, ORE., *March 10, 1932.*

Hon. CHAS. M. BLACKMAR,
Special Assistant to Attorney General,
906 Commerce Building, Kansas City, Mo.

MY DEAR MR. BLACKMAR:

With further reference to your letter dated February 27, 1932, please be advised that the following are the areas of land lying between the Neal 1895-meander line of Malheur and Mud Lakes, and the outer margin of our topographic surveys as represented by contour lines upon Exhibits Nos. 3 and 4, which would be flooded should the water surface of the lakes attain the elevations indicated:

Malheur Lake, East of Narrows Bridge

Elevation of water surface				4,093 ft.;	area flooded		2,500	acres
"	"	"	"	4,094 ft.;	"	"	7,500	"
"	"	"	"	4,095 ft.;	"	"	11,100	"
"	"	"	"	4,096 ft.;	"	"	15,600	"

Mud Lake, West of Narrows Bridge and East of Sand Reef

Elevation of water surface				4,093 ft.;	area flooded		1,325	acres
"	"	"	"	4,094 ft.;	"	"	2,275	"
"	"	"	"	4,095 ft.;	"	"	2,930	"
"	"	"	"	4,096 ft.;	"	"	3,130	"

With reference to Malheur Lake it should be particularly noted that above areas flooded at elevations of 4,095 and 4,096 feet are *within* the outer margin of our topographic surveys as represented by the contour lines upon Exhibit No. 3, and that our surveys by no means cover all of the lands adjacent to the Neal meander line of Malheur Lake, which are below elevations of 4,095 and 4,096 feet. For example, in lots 3 and 6, sec. 33, T. 26 S., R. 31 E., south of Malheur Lake the ground elevation on either side of the county road following the line between said lots is below 4,096 feet. This road is nearly three-quarters of a mile south of the south margin of our contour surveys.

Again in sections 13, 14, 23, and 26, T. 26 S., R. 31 E., and in section 18, T. 26 S., R. 32 E., north of Malheur Lake our topographic surveys do not extend back from the lake far enough to cover all lands below the 4,095-foot or the 4,096-foot contour lines. The same condition obtains throughout the major portion of T. 25 S., R. 32½ E.

It is probable that if our topographic surveys had been extended to cover all lands adjacent to Malheur Lake and lying below an elevation of 4,096 feet, they would show that with the water surface of the lake at said elevation the inundated area lying outside (landward) of the Neal 1895 meander line would be practically double the 15,600 acres reported herein.

A copy of this letter is being forwarded to Mr. Collins at Marshfield.

Very truly yours,

(Signed) CHESTER W. PECORE,
Cadastral Engineer.

BURNS, ORE.,
April 1, 1932.

Hon. CHARLES M. BLACKMAR,
Special Assistant to Attorney General,
906 Commerce Bldg., Kansas City, Mo.

MY DEAR MR. BLACKMAR:

I have your letter of March 24, 1932, inclosing a copy of a communication dated March 16 addressed to you by Mr. Liljeqvist requesting the areas above the 4,090, 4,091, and 4,092 foot contour lines in the bed of Malheur Lake east of the Narrows Bridge.

The following areas have been determined from (Plaintiff's) Exhibit 3, by planimeter. In order that the major portion of the peninsula upon which the Graves pump house is located, as well as the higher land adjacent to the meandered peninsula in sections 1 and 2 T. 26 S., R. 32 E., north of the lake might be included in the areas for the western portion of the lake bed, a line projected north from the meander corner of sections 25 and 26 T. 26 S., R. 31 E., south of the lake, has been adopted as the division line between the areas in the eastern and western portions of the lake bed.

MALHEUR LAKE EAST OF NARROWS BRIDGE

Above	Western portion	Eastern portion	Total
	Acres	*Acres*	*Acres*
4,090 feet	12,190	24,800	36,990
4,091 feet	10,800	19,154	29,954
4,092 feet	6,300	13,433	19,733

A copy of this letter is being forwarded to Mr. Collins at Marshfield, Ore.

Very truly yours,

(Signed) CHESTER W. PECORE,
Cadastral Engineer.

B. Meander Line of 1877

EVIDENCE RELATING TO

1. Contour Survey of 1931

Mr. Chester W. Pecore, called as a witness for the plaintiff, testified in substance as follows:

The meander line of 1877 is indicated on Plaintiff's Exhibit No. 3, in the form of a shaded line that commences on the west boundary of section 3, T. 27 S., R. 30 E., south Malheur Lake; thence it runs northeasterly; thence in a general easterly direction along the south side of Malheur Lake to a point in section 14, T. 26 S., R. 33 E.; thence in a general northerly direction to a point in section 19, T. 25 S., R. 33 E.; and thence in a general westerly direction to the west boundary of section 7, T. 26 S., R. 32 E., north of Malheur Lake. The entire meander line of 1877 was not completed in that year, but in the years and by the surveyors indicated on this map, Plaintiff's Exhibit No. 3. For example, here in T. 26 S., R. 30 E., and T. 27 S., R. 30 E., south of Malheur Lake, it is noted, "surveyed by H. C. Perkins in 1879." Township 26 S., R. 31 E., south of Malheur Lake was surveyed by John W. Meldrum in 1877; and so on. (R. 81–82.) The rest of the 1877 meander survey is likewise indicated. (R. 83.)

The 1877 meander line was not extended around Mud Lake. Perkins surveyed T. 26 S., R. 30, and T. 26 S., R. 31 E., north of the lake, in 1879, and did not meander Harney Lake or Mud Lake in either of those townships; nor Malheur Lake as shown on Plaintiff's Exhibit No. 3. (R. 114–115.)

South of Mud Lake the surveys were originally run by Perkins in 1879, and for some unknown reason he ran a meander; why he should have done so along the south, and not along the north, I do not know, but there was no meander line run to the Neal meander line, and the line of 1912 around those two townships north of the lake. (R. 114–115.)

2. Elevations—Contours

Mr. Chester W. Pecore, called as a witness for the plaintiff, testified in substance as follows:

The highest elevation on the 1877 meander line that obtains and stays at for any appreciable distance is 4,100 feet above sea level. That is considerably higher than the average elevation of that meander line. These townships surveyed by different deputy surveyors in different years have slightly different average elevation of that meander line but the average elevations on that line are:

AVERAGE ELEVATIONS 1877 MEANDER LINE

Township	Range	Elevation above sea level—in feet
25 South	32 East north of Malheur Lake	4,095
25 South	32½ East north of Malheur Lake	4,095
25 South	33 East north of Malheur Lake	4,097½
26 South	33 East south of Malheur Lake	4,098
26 South	32 East south of Malheur Lake	4,097 –4,098
27 South	32 East south of Malheur Lake	4,097 –4,098
26 South	31 East south of Malheur Lake	4,096½–4,097
26 South	30 East south of Malheur Lake	4,096

(R. 85–86)

Our adjusted elevation of the bench mark at the Narrows is 4,095.868. (R. 85–87.)

3. Water Conditions

a. In the Early Days

Mr. ROBERT IRVING, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

In August, 1887, I carried a chain for about two miles for a man named Graden when he surveyed to find the old Meldrum meander line. This survey was in the lower boundary of the Red "S" Field, then owned by Todhunter & Devine, on the north side of Malheur Lake.

Mr. LILJEQVIST. Q. Between the old lake line and the Red "S" Field, that is the line you retraced for about two miles?

A. Yes.

The company before that had run their fences over the surveyed line; they paid no attention to the Meldrum line; they run these fences out just as far as they could; the settlers came in there in 1887 on that unsurveyed land and then the Company had to take their fences up, and that fall they wanted to know where the line was again. (R. 443.) They put a surveyor in there to survey the line and I helped with that survey.

Mr. LILJEQVIST. Q. Where did you find the water (of the lake) was with reference to that survey at that time.

A. I don't know whether you would call it a lake or not; but there was water in those sloughs that came up to your armpits.

Mr. LILJEQVIST. Q. When you retraced the old Meldrum (R. 444) you had to go through water in many places?

A. Yes, sir. (R. 444.)

Redirect examination:

When I was out there assisting to chain that Meldrum line, the water of the main body of the lake would be out quite a ways, I suppose, but there was water there; but it was not running. It backed up into these sloughs. I can not give an estimate of the distance in miles, or in feet, but the main lake was some distance from that line. (R. 452–453.)

Mr. DARIUS HYNSON SMYTH, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I stopped right in there by the old Sodhouse (R. 476) when Meldrum and his crew came through there running the meander line (R. 475–476).

Mr. LILJEQVIST. Q. I wish you would tell the court what you saw with reference to water on that line, and the situation when he ran that line.

A. Well, all I could tell is that there was plenty of water there, but they were running the line too far up toward the mouth of the Blitzen; they ran it on the flood waters of the Blitzen, they waded right through the water waist deep and that was what struck me, to think that they would do that.

That was the flood water of the Blitzen.

Q. And that was one of the questions that was scrapped out in that famous law suit, wasn't it?

A. Yes.

I know where one corner of my deeded lands (on Cawlfield line and lands in front of it) is located, on account of a fence that (R. 477) was located above it.

Mr. LILJEQVIST. Q. Now, I want you to tell the court whether the backwater from the lake at ordinary high-water seasons comes up there and floods your deeded lands, and enables you to get a hay crop.

A. To some extent I think it does. (R. 478.)

Q. And is it the flood waters of the lake?

A. When the lake is up.

Q. From 1891 on, then, what is the fact about the waters of the lake usually in the springtime flooding your deeded lands?

A. Why, there was plenty of water there to get hay.

Q. Now, are you familiar with your neighbors around in that vicinity? Are you familiar with the deeded lands of your neighbors up and down that south side?

A. I guess I am.

Q. Did they get their deeded lands irrigated by the back (R. 478) waters of the lake?

A. I do not think so; not very much of it. I think it is from the running water of the Blitzen.

I do not know whether they put any dams in there, and I am not very familiar with the other persons' land. (R. 478–479.)

Mr. PRIM ORTEGO, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I am familiar with the Meldrum line near the Sodhouse Springs, and what is called the Sodhouse Lane; that is the road that runs from the old Sodhouse to the Narrows. In the springtime the water would come at times beyond the lane; at other times, it would not. (R. 522.)

Mr. LILJEQVIST. Q. Did the water ever come up to that old meander line as distinguished from the overflow of the Blitzen?

A. Yes, I have seen it go over and pass beyond the line. (R. 523.)

Q. Where Meldrum established his line on the south side of the lake, did you ever see the water there?

A. Yes, I have been there. (R. 530.)

Mr. GEORGE FRY, called as a witness for the plaintiff, testified in substance as follows:

I remember at one time I was working for Mr. French building a fence down toward Malheur Lake. I think we built the fence for about three miles west from the Sodhouse Spring on the (R. 1123) 1877 meander line. I think that was in October. The water was not anywhere near the meander line, except in the spring; that is only in the little lake, the Sodhouse. From time to time I have seen the water above the 1877 meander line.

Mr. BLACKMAR. Q. And I presume you have seen years, a good many years, when it did not come to the meander line?

A. Yes.

Some years the water went over the 1877 meander line. (R. 1124.)

Mr. WILLIAM HANLEY, called as a witness for the plaintiff, testified in substance as follows:

In that fall of 1880, the country where that meander line of 1877 is (R. 1354) was pretty well covered with water. I did not know anything about the meander line or anything about a survey at that time, and did not care about it; but that was all pretty well under water and the water was backed up probably quite a ways toward the Sodhouse. The line I am talking about was the Sodhouse Lane which was called the Meander Line Road; the meander line of 1877; that is the meander line; I knew that well. (R. 1355.)

Mr. A. A. REINEMANN, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Did your father ever point out to you a place on that Neal Meander Line where there was sagebrush above and below the meander line?

A. On the original one, the first one they had through there.

Q. Not on the Neal Line?

A. No, I don't remember about the Neal.

Q. That was on that line of 1877?

A. Yes. (R. 1670.)

Mr. THOMAS T. DUNN, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I remember where my mother's house was, she lived in it in the early days; the old Meldrum meander line (of 1877) was immediately above the house, south of the house.

Mr. LILJEQVIST. Q. Do you have any personal recollection from your earliest memories whether the water came out to where your mother had her house, and she was compelled to move the house back?

A. Yes; I do.

I can not remember of your visit to my mother in 1919; I don't believe I was there.

Mr. LILJEQVIST. Q. Now, do you remember the (Malheur) lake coming up to that point where the old house was, of your own recollection?

A. Oh, yes; I remember that. We had a milk house. There was a spring there right at the end of that little point that runs down there, and my brother-in-law first built that house, and my mother bought the house of him, and he built the house right close to this spring, and he built a little milk house just over the spring and the lake, when it was awfully high, the wind would blow it right up there, to the end of the little milk house over the spring; the spring is in a low place.

My mother had the house moved; she had the rheumatism pretty bad. (R. 1835.)

Later on, I think, Mr. Neal established the meander line north of it (the house); I don't know just how far. (R. 1835.)

4. Defendant's Exhibit X–4, Excerpts from Records in cases of French-Glenn Livestock Company v. Alva Springer; French-Glenn Livestock Company v. James Colwell; other evidence in connection with those cases.

Mr. ROBERT IRVING, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Now, do you know about the old law suit they had, don't you, that was in the Department of Interior with reference to the (1877 meander) survey?

A. Well, I have just heard about that. I don't know anything about it.

Q. From your testimony I thought you probably knew something about it. You were telling who were accused of cutting through the Sand Reef, and so forth. That is merely hearsay with you then?

A. Well, I was on the jury at that time. That is the way that hearsay came up. I was on a jury, and Mr. Springer was having a case over the meander line at the Sodhouse with Peter French, and I was on that jury, and (it) came into the evidence some way that

these three men went across there, and one of them took the toe of his boot and made a little ditch for it, so that it would just get over.

Q. The jury held there wasn't any lake along that meander line at that time of Meldrum, didn't they?

A. No. There was a meander line there.

Q. That was at the time of the big fight between the settlers and the Peter French-Glenn Company, wasn't it?

A. Mr. Springer went there in 1887.

Q. And you were on that jury? (R. 445.)

A. There was no fight at that time when he went there, because Mr. French didn't know he could claim over the meander line.

Q. And then later on he tried to claim over the meander line?

A. Yes, sir.

Q. And you were on the jury that decided against Peter French?

A. Yes, sir.

Q. He didn't have much of a chance before that jury anyway, did he?

A. Yes, sir; he had a chance; he had an equal show, as good as anybody else; but I don't think he had a chance when he told a man to go out there. He came along in his buggy, and he told Mr. Springer, "You are getting on my land," and he said "We will have trouble and a law suit. Ain't that land out there just as good as this?" And Mr. Springer said he didn't know what it was, and he said, "You go out there and we will never have any trouble." And he went out there. And then when the people came along on the meander line he got some fine high lawyer, and he said "Here, you can go to the middle of the lake."

Q. And the jury figured that was no way for French to treat anybody, didn't it?

A. I don't think you would either.

SPECIAL MASTER. Well, Mr. Irving has a very clear recollection of some phases of the litigation. (R. 446.)

Mr. LILJEQVIST. In other words, this helps to carry out the proposition that when you really get facts, the doctrine of res adjudicata does not apply.

A. I had some pretty clear ideas about that Meldrum meander line, too. I was wrong, though, I will admit that.

I always thought he put that line out there so far that he was favoring the stockmen because it was out so far, but when I read his field notes I changed my mind a little.

Q. Then, even though you were on the jury, you thought the Meldrum line was correctly established, did you?

A. Yes, sir; just from the field notes that I read; I changed my mind.

Q. At any rate, there wasn't any dry land along that line at the time of the trial, was there?

A. Oh, yes.

Q. Pardon me. The land that Mr. Springer was on was dry land at the time of the trial?

A. That is what they proved, some of it.

Q. And Peter French told him to go over on the land, and he went over on it, and then he tried to take it away from him?

A. Yes, sir. And he said, "We will make a test case out of it, and pick anyone to test it," and Springer's was the best case, and, of course, it would be if he told somebody to go out there and he would have no trouble, and that he didn't claim (R. 447) it.

Mr. LILJEQVIST. I think that is a pretty good interpretation of Glenn versus Springer, and I am not going to take any more time on that.

Q. Did Peter French testify in that case that he swam in the lake?

A. I do not remember that part of it. Peter French never held any malice toward anybody. He was always a good friend—Peter French. (R. 448.)

Mr. PHILLIP GORDON SMITH, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I know about where the survey was run in front of Mr. Springer's place; I was on that jury and heard the testimony.

I knew the land that Mr. Springer settled on. I was on that jury. I did not make any investigation at that time to find out whether the north line of Springer's (place) came to the (Malheur) lake. He (Springer) settled on the land between the lake and the old meander line.

I was one of those jurors in that case (Springer v. French-Glenn Livestock Company).

Mr. LILJEQVIST. Q. And you tried Pete French, did you?

A. Yes; we heard the testimony. (R. 1747.)

Mr. ALVA SPRINGER, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Mr. Springer, you were a party to the famous suit with the French-Glenn Livestock Company reported in the Oregon Supreme Court?

A. Yes, sir. (R. 2016.)

SPECIAL MASTER. I want to be sure that something is in. The case of French-Glenn Livestock versus Springer, decided by the Supreme Court of Oregon, August 11th, 1899, and reported in 35 Oregon, at 312; and also in 58 Pacific 102, was the subject of a writ of error to the United States Supreme Court, where the cause was decided April 7th, 1902, and there affirmed, and the affirmance is reported in 185 U. S. 47; 22 Supreme Court Reporter, 563.

The second case is French-Glenn Livestock Company versus (R. 2337) James Colwell, decided August 11th, 1899, and reported in 36 Oregon 600, 58 Pacific 1119. This case also was made the subject of

a writ of error issued by the United States Supreme Court, and there affirmed on April 7th, 1902, in 185 U. S. 54; also in 22nd Supreme Court Reporter, 566.

The third case is called Cawlfield vs. Smyth, 69 Oregon 41, 138 Pacific 227, decided January 27th, 1914.

Now, in previous discussions mention was not made of the Colwell case, but I understand that counsel are to examine these records in the office of the Clerk of the Supreme Court of the State of Oregon, and are to take such extracts from the records and briefs there as they may be advised as to the matters that bear upon the statements in the Springer case and in the Smyth case that Lake Malheur was a nonnavigable lake.

Mr. LILJEQVIST. Yes, sir.

(NOTE.—See Defendant's Exhibit X–4 (R. 2338), Vol. I, page 108, this Abstract, and Plaintiff's Exhibit 59, Vol. I, page 247, this Abstract; also Excerpts made by Plaintiff from Plaintiff's Exhibit 60, Vol. I, page 147, this Abstract.)

SPECIAL MASTER. Now, that leaves open only for agreement the question for what recourse may be had with the transcript of the records and briefs in the first two cases lodged with the Clerk of the Supreme Court of the United States.

Mr. LILJEQVIST. I will stipulate in this case, your honor, that this Court may take judicial knowledge, or something analagous to judicial notice of the original records. I assume the court would have a right to examine its own records in another case, but I am willing to stipulate that they may do so, and may be considered a part of the case for whatever bearing they may have. (R. 2338.)

Mr. BLACKMAR. I think, your honor, I can arrange with the Clerk of the Supreme Court to furnish the bound volumes of that to you for your inspection, and it might be well for me to do it in that way.

SPECIAL MASTER. Well, it is agreed on the part of the Government that the Court may have recourse to the records and briefs in both of those cases.

Mr. BLACKMAR. Yes, your honor; that is correct.

SPECIAL MASTER. And if I have an opportunity to see them, I will be glad to look at them. (R. 2339.)

SPECIAL MASTER. I think a number should be assigned as a defendant's exhibit for the memorandum which is to be agreed upon by counsel and filed with respect to the three cases, the titles and reports on which were read by me this forenoon. That is Defendant's Exhibit No. X–4. (R. 2342–2343.)

DEFENDANT'S EXHIBIT X–4

In the Supreme Court of the State of Oregon

Excerpts from the brief filed by appellant in the Supreme Court of the State of Oregon in the case of the French-Glenn Livestock

Company, appellant, vs. Alva Springer, respondent, and The French-Glenn Livestock Company, appellant, vs. James Colwell, respondent, and the reported decisions of which cases are given in 35 Or. 312, 58 Pac. 102, and 36 Or. 600, 58 Pac. 1119, respectively.

The reply in the Colwell case

The plaintiff's reply to the answer of Defendant Colwell is as follows:

"Admits that the land described in the complaint in this action, and for the recovery of which this action is brought, is within the meander line of Malheur Lake which was established in the year 1877, and avers that said meander line was in said year duly established by the Government of the United States as the meander line of said lake; the said lake then and there being and still being an inland, innavigable lake.

Pages 9 and 10, appellant's brief (vol. 134, Oregon briefs, Supreme Court Library)

"As to land bounded by non-navigable water, the decided weight of authority is that the grant itself carries the title of the grantee to the middle or thread of the stream or lake, and that hence the land under the water down to the middle of the thread of the water belongs to the grantee of land bounded by the water, irrespective of its becoming bare by accretion or reliction."

Appellant's brief page 37 (vol. 134, Oregon briefs)

The following are excerpts from respondents' brief in the same case:

"Before considering what right is acquired by a purchaser who thus buys upon the faith of the maps and plats of survey, it may be well to suggest that, so far as this branch of the discussion is concerned, it is conceded that one who purchases land which, at the time of the purchase, really borders upon the water of a non-navigable lake, owns to that extent to the center of the lake unless there is something in the grant or deed by which title is conferred limiting his purchase."

Respondents' brief pages 10 and 11 (vol. 134, Oregon briefs)

"We have already conceded, for the purpose of the present discussion, that where one purchases land which, at the time of the purchase, actually borders on the waters of a non-navigable lake, and there is nothing in the grant or deed indicating a limitation, he takes to the center of the lake."

Respondents' brief page 21 (vol. 134, Oregon briefs)

STATE OF OREGON,
County of Marion, ss:

I, A. S. Benson, Clerk of the Supreme Court of the State of Oregon, do hereby certify that I have compared the foregoing copy of excerpts from the briefs of the appellant and respondents in the case of the French-Glenn Livestock Company vs. Alva Springer, respondent, and the French-Glenn Livestock Company vs. James Colwell, respondent, and which briefs are in my custody as such clerk, and such excerpts are true and correct transcripts of such originals and of the whole of such excerpts as the same appear on file and in my custody, and being the original briefs in the case decided by the Supreme Court of Oregon entitled "French-Glenn Livestock Company vs. Springer" and "French-Glenn Livestock Company vs. Colwell" reported in 35 Or. 312, 56 Pac. 102, 36 Or. 600 and 58 Pac. 1119, respectively.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court this 30th day of November, 1931.

[SEAL.] (Signed) ARTHUR S. BENSON,
Clerk of the Supreme Court of the State of Oregon.

5. Plaintiff's Exhibit 61, Excerpts from Plaintiff's Exhibit No. 60, Which is a Copy of the Complete Transcript of Record in the Case of the French-Glenn Live Stock Company v. Alva Springer and Same v. Colwell, on File in the Clerk's Office, Supreme Court of the United States

Transcript of Record, Supreme Court of the United States. October term, 1901, No. 124. The French-Glenn Live Stock Company, plaintiff in error v. Alva Springer. In error to the Supreme Court of the State of Oregon. Filed August 3, 1900. 17,856.

Transcript

THE FRENCH-GLENN LIVE STOCK COMPANY, Appellant

vs.

ALVA SPRINGER, Respondent

Appeal from the circuit court of Harney county—Hon. Morton D. Clifford, judge.

Thornton Williams and C. W. Parrish, att'ys for appellant.

L. R. Webster and John Cummins, att'ys for respondent.

Be it remembered, that heretofore, on the 27th day of November, 1896, a complaint was filed in the office of the clerk of the circuit court, in and for the county of Harney, in words and figures, as follows:

In the Circuit Court of the State of Oregon for Harney County.

The FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff

v.

ALVA SPRINGER, Defendant

Pl'ff complains that pl'ff is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal office or place of business in Chico said State, and doing business as a live-stock raising and cattle company in the State of Oregon and elsewhere.

II

That plaintiff is the owner and entitled to the immediate possession of the following-described real property, situate in Harney county, State of Oregon, and more particularly described as follows to wit:

Beginning at the northeast corner of lot two of section thirty-five in township twenty-six south range thirty-one east of the Williamette meridian south of Malheur lake in said county of Harney and State of Oregon as appears on the maps of survey of the said township in the office of the register and receiver of the U. S. land office at Burns, Oregon, running from said point north one-quarter of a mile or thereabouts; thence west one mile or thereabout; thence south one-quarter of a mile or thereabout to the point of the fence enclosing said premises at or near the northwest corner of lot 3 of section thirty-four in said above-mentioned township and range, east of said meridian and south of said lake in said county and State according to said map thence easterly following the meander line of said lake as shown by and upon said map to the place of beginning, containing 160 acres of land or thereabout, and that the estate of plaintiff in the said property is in fee-simple absolute and that plaintiff is entitled to the possession thereof and to the whole thereof.

III

That the defendant Alva Springer unlawfully and wrongfully withholds the same from plaintiff to plaintiff's damages as follows:

That said Alva Springer wrongfully and unlawfully maintains and has maintained for more than six years last past and since about the year 1888 a fence enclosing said premises and has kept; herded and maintained a large number of cattle thereon, whereby the said cattle have trampled down, eaten out and otherwise destroyed a large portion of the native grasses of said lands and deprived the plaintiff of the same to the plaintiff's damage of 50 cents an acre for each of said six years so last past for each and every

acre of which pl'ff has been so deprived making an aggregate total of four hundred and eighty dollars.

IV

That the defendant notwithstanding demands of possession frequently made by pl'ff for said property has during all of said time above mentioned unlawfully and wrongfully withheld and still unlawfully and wrongfully withholds and detains the same and each and every part and parcel thereof from the pl'ff and wrongfully and unlawfully denies pl'ff's right to the possession of the same or any part thereof to pl'ff's damages as hereinbefore stated.

Wherefore plaintiff demands judgment for the possession of the said real property hereinabove described and each and every part and parcel thereof and for the sum of $480 damages for withholding the property for the term of six years next preceding the commencement of this suit, besides the costs and disbursements of this action.

CHARLES W. PARRISH,
VICTOR G. COZAD, AND
THORNTON WILLIAMS,
Att'ys for Pl'ff.

In the Circuit Court of the State of Oregon for Harney County

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff

vs.

ALVA SPRINGER, Defendant

Answer

The defendant for answer to the complaint in the above-entitled action, alleges that:

As to whether plaintiff is a corporation duly or at all organized or existing under or by virtue of the laws of the State of California or at all or as to whether it is doing business as a live-stock raising or cattle company in the State of Oregon or elsewhere plaintiff has no knowledge or information thereof sufficient to form a belief and therefore denies the same.

I

Denies that the plaintiff is, or at any time heretofore was the owner of, or that it is or at any time was entitled to the possession of the land and premises described in the complaint, or any part thereof.

II

Denies that plaintiff has or at any time heretofore had, or in any manner was entitled to, an estate in fee-simple absolute, or of any

estate, title, or interest of any nature or character in or to said described premises or any part thereof.

III

Denies that he wrongfully or unlawfully, withholds said lands and premises from plaintiff to its damage or otherwise or at all.

IV

Denies that he wrongfully or unlawfully maintains any fence on or enclosing the premises described in the complaint or any part thereof or that he ever has so maintained any such fence or any fence.

V

Denies that he has at any time ever herded or maintained a large or any number of cattle on the land described in the complaint or any part thereof which have in any manner caused the plaintiff any damage whatever and denies that the plaintiff has been damaged by any act of this plaintiff (defendant) in connection with said land in the sum of four hundred and eighty dollars, or any other sum.

VI

Denies that he now does, or ever has unlawfully withheld or detained from the plaintiff the real estate described in the complaint or any part thereof.

VII

For a further defense he alleges that in July 1888, he located or contemplated settling upon and acquiring title under the laws of the United States, to another tract of land lying a short distance from that described in the complaint; that about that time Peter French, the president, superintendent and general manager of plaintiff, one of its principal stockholders and one of its directors having entire charge and management then and ever since of its affairs in this State, advised defendant not to remain there, but to go upon the tract of land described in the complaint, representing that it was vacant and unclaimed public land, and much more suitable for a homestead for defendant than where he at first contemplated settling.

That in pursuance of such advice and recommendation and solely because thereof defendant at once abandoned his former location and removed to and settled upon the tract described in the complaint, where he has continued to reside ever since with the knowledge of plaintiff and of said French, and with the knowledge and acquiescence of said French and said plaintiff he has made and erected permanent lasting and valuable improvements upon said land which are now of the reasonable value of five hundred dollars.

That neither said French nor the plaintiff ever notified defendant that he or it ever claimed any right to or interest in said land or any part thereof, until about August 1894, when plaintiff through said French first assumed to and did assert some pretended claim thereto, based upon the contention that the line of survey between certain land claimed by plaintiff on the north and that described in the complaint was a meander line along the margin of Lake Malheur, and that said lake margin had theretofore permanently receded leaving the land in dispute in the condition it now is.

VIII

Defendant further alleges that said pretended meander line was run or surveyed in the year 1877, and that a new meander line was run through that part of the county in 1895, varying materially in much of its course from that run in 1877 and that neither of them was actually run along or near the margin of said lake anywhere in the vicinity of the tract described in the complaint, but that each of said lines was run a mile or more from the actual margin of said lake, leaving a tract of public land comprising many hundreds of acres, well adapted to agricultural purposes, between said alleged meander lines and the margin of said lake, unsurveyed of which the tract here in controversy is a part; that said lands are in the same general condition, and of the general character that they were when said meander lines were run; that for a long time prior thereto, and ever since there has been as defendant is informed and believes, no appreciable recession of the waters of said lake, nor have there been any appreciable accretions of land along that side of said lake nearest the land in controversy; the lands here claimed are not accretions, nor are they lands made suitable for agriculture by the recession of the waters of said lake since plaintiff acquired title to any of the lands adjoining them or since said surveys.

Wherefore having fully answered herein defendant demands judgment for his costs and disbursements herein.

JOHN CUMMINS &
L. R. WEBSTER,
Attorneys for Defendant.

And afterwards, on the 19th day of May, 1897, there was filed in the office of said clerk a reply in words and figures as follows:

In the Circuit Court of the State of Oregon for Harney County

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff

vs.

ALVA SPRINGER, Defendant

The plaintiff for reply to the affirmative matter set forth in the defendant's answer, in this action, and the further defense to plain-

tiff's cause of complaint, denies that in July, 1888 or any other day, date or time, he located and as to whether or not he contemplated settling upon or acquired title, under the laws of the United States, or another tract of land lying a short or other distance from that described in the complaint, plaintiff has no knowledge or information sufficient to form a belief, and therefore denies the same.

Denies that about that time, or any time or ever, or at all, Peter French, the president, superintendent or general manager of plaintiff or one of its principal stockholders or one of its directors, having entire charge or any charge or management, then or ever since, or at all of its affairs in this State, or elsewhere, or otherwise or at all, advised the defendant not to remain there, but to go upon the tract of land described in the complaint, or to go upon the tract of land described in the complaint, representing that it was vacant, or unclaimed public lands, or otherwise, or much more suitable or any more suitable for a homestead or otherwise for defendant, than where he at first contemplated settling, or otherwise represented to the defendant, as alleged or at all.

Denies that in pursuance of such or any advise or recommendation, or solely, or otherwise, because thereof, defendant at once abandoned or at all abandoned his former location, as alleged, or any location, or removed to or settled upon the tract described in the complaint, where he has continued to reside ever since with the knowledge or acquiescence of the plaintiff, or of said French, or otherwise, or at all, he has made or erected permanent, lasting or valuable improvements upon said lands, which are now or at all, of the reasonable value of five hundred or any other number of dollars, or otherwise, or at all.

Denies that neither said French, nor the plaintiff ever notified the defendant that he or it, ever claimed any right to or interest in said lands or any part thereof, until about August, 1894, or any other date, or any date later than 1888, but on the contrary avers that plaintiff notified the defendant of the plaintiff's rights and interests in said lands, as early as the year 1888, as aforesaid, and many times since.

Denies that it was August, 1894, or any other date later than 1888 when said Peter French first assumed to or did assert a claim thereto, to the defendant, based upon the line of survey between certain lands claimed by plaintiff on the north, and that described in the complaint, as a meander line along the margin of Lake Malheur, and that said lake margin had theretofore permanently receded, leaving the land in this suit, in the condition it now is, and denies that said claim is a pretended claim, as alleged, or is based upon pretensions, but avers same is and was based upon facts, that the line of survey, aforesaid, was such meander line.

Admits that said meander line was run and surveyed in the year 1877, but denies that a new meander line was run through that part of the country in 1895, or any other year or at all varying materially or otherwise, in much or any of its course, from that run in 1877,

and denies that said meander line, surveyed and run in the year 1877 was not actually run along or near the margin of said lake anywhere in the vicinity of the tract described in the complaint, or that said meander line run in the year 1877 was run a mile or more or any material distance, or any distance from the actual margin of said lake, as said margin was at the time of the survey of said line, or leaving a tract of public lands comprising many hundreds, or any acres or any number of acres, well or at all adapted to agricultural or other purposes, between the said alleged meander line, and the margin of said lake, unsurveyed or otherwise, or of which alleged pretended unsurveyed public lands, the tracts herein in controversy, or any part thereof, is or ever was a part; denies that said lands are in the same general condition, or of the general character, that they were when said meander line so run in 1877 was run; denies that ever since the said meander line was surveyed and run in 1877, or at any time since there has been no appreciable recession of the waters of said lake; denies that there have not been any appreciable accretions along the side of said lake, nearest the land in controversy, since said meander line was run in 1877; denies that the lands here claimed are not accretions, nor lands made suitable for agriculture by the recession of the waters of said lake, since plaintiff acquired title to any of the lands adjoining them, or since said survey of said meander line of 1877, but on the contrary avers that the lands here claimed are accretions and are lands made suitable for agriculture by the recession of the waters of said lake, since plaintiff, its predecessors and grantors, acquired title to the adjoining lands, next south and along the said meander line of said lake as surveyed in the year 1877, which survey was duly approved by the proper officers and departments of the Government of the United States, having charge of such matters, and that the accretions, aforesaid, have occurred since said survey, and the running of said meander line in the year 1877.

Wherefore plaintiff demands judgment as in its complaint demanded.

CHAS. W. PARRISH AND
THORNTON WILLIAMS,
Plaintiff's Attorneys.

And afterwards, on the 29th day of May, 1897, it being the 12th judicial day of the May term of said court, the cause came on for trial when the following proceedings were had:

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff

vs.

ALVA SPRINGER, Defendant

Now on this day comes the jury in the above-entitled cause, into open court in charge of their bailiff and in presence of the respective parties and their att'ys returned the following verdict.

In the Circuit Court for Harney County, Oregon

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff

vs.

ALVA SPRINGER, Defendant

We the jury in the above action find for the defendant.

WM. M. STEWART, *Foreman.*

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff

vs.

ALVA SPRINGER, Defendant

Comes now the plaintiff by C. W. Parrish, Thornton Williams, and Waters and Gowan its attorneys and comes also the defendant by L. R. Webster and John Cummins Esqrs. his attorneys, and comes on to be heard the motion for a new trial in this case, and the court having duly considered the matter and being fully advised in the premises now overrules and denies said motion and now said defendant by his attorneys aforesaid moves the court for judgment on the verdict of the jury heretofore rendered in his favor herein and for judgment against said pl'ff for his costs and disbursements herein, and the court being fully advised in the premises it is now ordered and adjudged that the defendants herein do have and recover of and from the pl'ff his costs and disbursements herein taxed at $281.00 *dollars* and — costs.

Record signed.

MORTON D. CLIFFORD,
Circuit Judge.

13. After both parties had closed their testimony, and after argument of counsel, the court, instructed the jury among other things as follows:

"I instruct you, gentlemen of the jury, that the plaintiff in this case must succeed, if at all, upon the strength of his own title to the lands described in the complaint; and it devolves upon the plaintiff to convince you by a preponderance of the evidence that it is the actual owner of all the lands described in the complaint, and unless you are so convinced, you must find for the defendant."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

14. Whereupon the court further instructed the jury as follows:

"I instruct you that the fact that there may have been a meander line along the northern boundary of lots 3 and 4 in section 34, and lots 1 and 2 in section 35, township 26 south, range 31 E. W. M., is not conclusive evidence of the existence of a lake; you will therefore weigh and consider all the evidence in this case, and from the whole evidence determine the fact as to whether or not there is in

reality a lake north of and adjoining the said lots; and if there was not such lake, you will find for the defendant."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

15. The court having also instructed the jury as follows: "I instruct you that before you can find for the plaintiff you must be satisfied from a preponderance of the evidence that there was a lake immediately north of lots 2 (3) and 4 in section 34, and lots 1 and 2 in section 35, township 26 south, range 31 E. W. M.; but if you believe from the evidence that there was a swamp or marsh instead of said lake immediately north of and adjoining said lots, then you will find for the defendant; in other words, it is a fact for you to determine whether or not there was a lake."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

16. The court also instructed the jury as follows:

"The evidence in this case shows that plaintiff was the owner of lots 3 and 4 in section 34, and 1 and 2 in section 35, township 26 south, range 31 E. W. M., in said county. This is not the property described in the complaint in this case; but the plaintiff claims that by reason of the ownership of this property, it also claims the property described in the complaint, and bases its right of recovery in this action upon such right to ownership. In order for plaintiff to recover in this action it must be shown by a preponderance of the evidence that on or about the 12th day of March, 1860, the said lots were bounded on the north by the waters of Malheur lake; and if you are not so convinced by a preponderance of the evidence that said lots were so bounded, then you must find for the defendant."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

17. The court also instructed the jury as follows:

"I instruct you that before you can find for the plaintiff you must be satisfied from a preponderance of the evidence that lots 3 and 4 in section 34, and lots 1 and 2 in section 35, township 26 south, range 31 E. W. M., bordered on the meander line. You must also be satisfied from a preponderance of the evidence that the waters have receded and left the lots described in the complaint here in dispute as accretions to said lands, or from which the waters have permanently receded so as to leave them in the condition they are now."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

And defendant having rested his case-in-chief; and pl'ff having introduced in evidence a copy of a Government map showing the general location of the country around Malheur lake and the same marked Exhibit "J" plaintiff's proofs and made part of the record herein and is hereto attached and made a part hereof, and having called in rebuttal several witnesses and among others PETER FRENCH,

who having testified to having caused a map or plat to be made under his supervision and direction showing the meander line of Malheur lake and the borders of the pl'ff's lands and the territory they cover from the meander line south for a distance, copied from a map in the surveyor general's office, the lands within the green border being pl'ff's and the map being correct so far as it is a general representation of the pl'ff's lands upon the line of the Blitzen down to the meander line of the lake; and that the acquirement of those lands and the large stock interests connected therewith, now the business and property of the French-Glenn Live Stock Co. has been the study of his whole life since boyhood; the said map was introduced in evidence for the purpose of showing the extent of the pl'ff's enterprise, and which having been received and shown to the jury was marked and filed as Exhibit "L" pl'ff's proofs and made part of the records in this case and also part hereof. And pl'ff having finally rested, the def't was recalled upon rebuttal, and he having testified upon such rebuttal def't also closed his case. Whereupon after argument of counsel, the court charged the jury as set forth in full in said transcript and after having said to them among other things

"The principal question for you to decide, gentlemen of the jury, is a question of fact; and that fact is whether or not these lands upon which the def't has settled, and is settled at the present time, are lands included in the adjoining tract of land, described by the pl'ff in this case, and to which they claim title; and which they claim belongs to this land by virtue of these extending lines, or accretions, as they call it, which extend out into this lake which is called Malheur lake."

Also the following:

"I instruct you, gentlemen of the jury, that by virtue of an act of Congress passed March 12th, 1860, the provisions of an act of Congress passed Sept. 28th, 1850, entitled An act to enable the State of Arkansas and other States to reclaim the swamp lands within their boundaries, *was* extended to the States of Minnesota and Oregon; and by said act the U. S. granted to the State of Oregon all the swamp and overflowed lands within its boundaries; and by said act it was left the duty of the Secretary of the Interior to designate such lands and approve the selection thereof; and before any particular tract of land could become the property of the State of Oregon, the same were to be selected, and such selections approved by the Secretary of the Interior although this act was a grant *in presenti*, in other words, a present grant at the time of the passage of the act of M'ch 12, 1860, all selections were to be approved by such Secretary of the Interior before title could pass to the State of Oregon to any definite tract.

"If you find, gentlemen of the jury, that pl'ff was, prior to the 24th day of January, 1894, a private corporation, duly existing under the laws of the State of California (and it is admitted that the corporation was organized and existing under and by virtue of

the laws of the State of California; and that may be considered by you as a fact) and still is such and doing business in the State of Oregon, having the right to acquire and hold lands; and that on the 24th day of January, 1894, said pl'ff by deeds duly executed from the grantee of the State of Oregon, and under the patent of the United States, became the purchaser of the fractional lots three and four in section thirty-four and lots one and two in section 35, in township 26 south, range No. 31 E. Willamette meridian, lying south of the Malheur lake, then its title unless restricted by some clause in the deed of conveyance extended to the center of Malheur lake, if you find from the evidence in this case that the north line of said lots was, at the time of the U. S. survey the south meander line of said Malheur lake and that said lake was unnavigable.

"I instruct you further that after the meander line of an unnavigable stream or lake has been surveyed, and such survey approved by the Government of the United States, the plat thereof filed in the local land office in the district wherein the said meander line was so surveyed and after the Government has parted with its title to other persons in the lands lying upon the borders of said lake abutting upon said meander line, then the owners of said lands so abutting upon said meander line and upon the shores of a stream or lake so meandered are entitled to become the owners of all accretions to said lands either by the depositing of sediment or earth in front thereof, or by the receding of the waters of said stream or lake, even to the center of such stream or lake.

"I instruct you that the recession of the waters of a stream or lake, and by recession I mean the receding of the water, may be caused by artificial or natural means; and it makes no difference whether such accretions have occurred gradually through a long period of time, or whether suddenly as by some convulsion of nature."

And also after having charged the said jury to this effect, to wit:

"I instruct you that you are bound to find this lake boundary to be where the plat of survey and the field-notes of the Government survey have designated it to be from all the facts in this case.

"The Government by the aid of its proper officer has a right to fix and declare the place of the lake for the purposes of the survey and for the sale of the land and after that place has been so designated by such survey and such survey approved and acted upon by the Government, such survey cannot after the rights of third parties have intervened, be questioned or contradicted.

"I instruct you that meander lines are run when survey fractional portions of public lands bordering upon unnavigable streams or lakes not as the boundaries of a tract but for the purpose of defining the sinuosities of the banks of the stream or lake as nearly as practicable and as a means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field-notes a meander

line is represented as the border line of the unnavigable stream or lake, and shows to a demonstration that the channel of the river course or the center of the lake, as the case may be, and not the meander line as actually run on the land is the boundary.

"I instruct you that a patent of the U. S. cannot be questioned collaterally but before its validity can be impeached or questioned it must be shown that such patent has been set aside by a court of competent jurisdiction, and this is not such an action or suit.

"If you find under the instructions I give you and under the evidence in this case that the pl'ff was at the time of the commencement of this action the owner of the lands in controversy by reason of being the owner of fractional lots 3 and 4 in section 34 and 1 and 2 in section 35, township 26 south, range No. 31 E. Willamette meridian, on the south side of Malheur lake, then I instruct you that the defendant could no more rightfully detain possession of the lands in controversy than he could of lots 3 and 4 in section 34 and 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian, unless he claimed under the pl'ff or its grantors or predecessors.

"I further charge you that if you find that the Government of the United States did in the year 1877 make an approved survey of the meander line on the south side of Malheur lake and the said line was established as the north line of fractional lots 3 and 4 in section 34 and 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian lying south of Malheur lake; and if you find that since said time it has patented said fractional lots to other persons, the grantors and predecessors of the pl'ff then the Government had not nor has it any right to disturb said meander line even though actually at the time of said survey there were lands lying between said meander line and the actual border of the lake.

"I charge you that the following is the rule for construing the descriptive part of a conveyance of real property when the construction is doubtful and there *is* no other sufficient circumstances to determine it. When a road or stream of water not navigable is the boundary the rights of the grantor to the middle of the road or bed of the stream are included in the conveyance except where the road or bed of the stream is held under another title.

"I further charge you that where a stream is meandered in the public surveys, the stream and not the meander line is the true boundary of the riparian owner.

"Such is the law of this State and in accordance with it I charge you that if you find that the pl'ff was prior to the time of the commencement of this action the riparian owner of the fractional lots I have mentioned bounded by a meander line and that there are lands between the meander line and the water line of Malheur lake the pl'ff is and was also the owner of the lands between the meander line and the water line, be it small or great, and you must find for the pl'ff if you further find from the evidence and the instructions

I give you in this charge, the other material allegations of the complaint to be true, and the deft's plea of estoppel not sustained.

"If the jury find from the evidence that at the date the acts and words constituting the estoppel plead by the def't in this case the legal title to the lands in question was in the State the defense of an estoppel fails and the jury will not consider such acts and words.

"I charge you gentlemen of the jury that a lake is a large and extensive collection of water contained in a hollow of the earth and it is not necessary that the same be wholly an open body of water."

Which, after having so charged the jury at the request of the pl'ff the court followed up with the following charges, given at the request of defendant and duly excepted to by the pl'ff to wit:

Thirteenth exception

"I instruct you, gentlemen of the jury that the pl'ff in this case must succeed, if at all, upon the strength of its own title to the lands described in the complaint; and it devolves upon the pl'ff to convince you by a preponderance of the evidence that it is the actual owner of all the land described in the complaint; and unless you are so convinced you must find for the def't."

To which instruction pl'ff's counsel duly excepted and said exception was then and there duly allowed and recorded.

Fourteenth exception

Whereupon the court further instructed the jury as follows:

I instruct you that the fact that there may have been a meander line along the northern boundary of lots 3 and 4 in section 34; and lots 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian is not conclusive evidence of the existence of a lake; you will therefore weigh and consider all the evidence in this case and from the whole evidence determine the fact as to whether or not there was in reality a lake north of and adjoining said lots; and if there was not such lake, you will find for the defendant.

To which instruction pl'ff's counsel duly excepted and the said exception was then and there duly allowed and recorded.

Fifteenth exception

The court also instructed the jury as follows:

I instruct you that before you can find for the pl'ff you must be satisfied from a preponderance of the evidence that there was a lake immediately north of lots 2 (3) and 4 in section 34 and 1 and 2 in section 35 township 26 south, range No. 31 E. Willamette meridian; but if you believe from the evidence that there was a swamp or marsh instead of said lake immediately north of and adjoining said lots, then you will find for the defendant. In other words, it is a fact for you to determine whether or not that was a lake.

To which instruction the pl'ff'-counsel duly excepted and said exception was then and there duly allowed and recorded.

Sixteenth exception

The court also instructed the jury as follows:

"The evidence in this case shows that pl'ff was the owner of lots 3 and 4 in section 34 and 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian, in this county. This is not the property described in the complaint in this cause; but the pl'ff claims that by reason of the ownership of this property, it also claims the property described in the complaint, and bases its right of recovery in this action upon such right to ownership. In order for pl'ff to recover in this action, it must be shown by a preponderance of the evidence that on or about the 12th day of M'ch 1860 said lots were bounded on the north by the waters of Malheur lake; and if you are not so convinced by a preponderance of the evidence that said lots were so bounded, then you must find for the def't.

To which instruction pl'ff's counsel duly excepted and said exception was then and there duly allowed and recorded.

Seventeenth exception

The court also instructed the jury as follows:

I instruct you before you can find for the pl'ff you must be satisfied from a preponderance of the evidence that lots 3 and 4 in section 34 and 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian bordered on the meander line. You must also be satisfied from a preponderance of the evidence that the waters have receded and left the lots described in the complaint, here in dispute, as accretions to said land, or from which the waters have permanently receded so as to leave them in the condition they are now.

To which instruction pl'ff's counsel duly excepted and said exception was then and there duly allowed and recorded.

Respectfully submitted,

THORNTON & WILLIAMS AND
CHAS. W. PARRISH,
Plaintiff's Attorneys.

THE FRENCH-GLENN LIVE STOCK COMPANY, Appellant

v.

ALVA SPRINGER, Respondent

Appeal from Harney county; Hon. Morton D. Clifford, judge.
W. Lair Hill, for appellant.
L. R. Webster, for respondent.
Wolverton, C. J.
Affirmed.
Filed Aug. 11 1899.

J. J. MURPHY, *Clerk.*
By ——— ———, *Deputy.*

This is an action to recover the possession of 160 acres of land, situate in Harney county, Oregon, lying to the north of and adjoining lots numbered 3 and 4 of section 34 and lots numbered 1 and 2 of section 35, township 26 south, range 31 east of the Williamette meridian, as described on the maps of survey of the said township in the office of the register and receiver of the United States land office at Burns, Oregon. The cause was tried before a jury, and, the verdict and judgment being for the defendant, the company appeals.

The plaintiff, to support its contention of ownership of the fee, offered in evidence, (1) the official plat of the United States Government survey of fractional township 26 south, range 31 east of the Williamette meridian, showing the township rendered fractional by abutting upon the meander line along the south side of Malheur lake, which plat appears to have been approved by the Land Department of the Government and filed in the local office on September 17, 1877; the plat shows said lots as bounded on the north by the meander line of Malheur lake; (2) the field-notes of the survey of the exterior boundaries of said township and its subdivisions, and the meander line of Malheur lake, under the title heading, "Meanders of the south shore of Malheur lake, through fractional township 26," etc., and indicating that it was run "with the meander of the lake;" (3) a list of selections of land, made by the agent of the State of Oregon, claimed as swamp and overflowed, with the approval of the Secretary of the Interior, bearing date September 19, 1889; (4) two patents from the United States, for said lots 3 and 4, section 34, and 1 and 2, section 35, "according to the official plats of the survey of the said lands returned to the General Land Office by the surveyor general." The patents bear date March 10, 1890, and October 8, 1891, respectively. The lots contain, in the aggregate, 158.53 acres; (5) two conveyances from the State, comprising the above-described lots, bearing date October 7, 1889, and April 30, 1890, respectively, and other mesne conveyances to the plaintiff; and (6) oral evidence, tending to prove that in 1877, and for some years thereafter, Malheur lake was a continuous body of water up to the meander line of that year; that there was a narrow ridge or reef across the west end thereof, some 12 or 15 miles west of the lands in dispute, which separated its waters from those of Harney lake; that its waters were from 8 to 12 feet higher than those of Harney lake; that, in 1881, the waters of Malheur lake, overflowing the ridge, cut a channel through, which was enlarged from year to year for some time; that, as a result, its surface was lowered, the waters receding from the flat, shelving shore leaving the disputed land bare, except in the spring-time, from and after 1884. This constituted the plaintiff's case. On behalf of the defendant, evidence was introduced tending to show that there never was a lake in front of the said lots; that Malheur lake is a well-

defined, natural body of water, but that, if the east and west exterior lines of said lots were extended north indefinitely, they would not touch or intersect the margin or border of said lake, but would leave it entirely to the east thereof; that the water of the lake had been, from a time prior to 1877, of about the same height as it was at the date of trial; that the border of the lake never at any time extended to the supposed meander line of 1877, and that there never had been any recession of the water of the lake and a consequent reliction of land in front of the said lots.

The court instructed the jury as follows, to which exceptions were taken and saved by the plaintiff: "I instruct you that the fact that there may have been a meander line along the northern boundary of lots 3 and 4 in section 34, and lots 1 and 2 in section 35, township 26 south, range 31 east, is not conclusive evidence of the existence of a lake. You will therefore weigh and consider all the evidence in this case, and from the whole evidence determine the fact as to whether or not there was in reality a lake north of and adjoining said lots; and if there was not such lake, you will find for the defendant. * * * I instruct you that, before you can find for plaintiff, you must be satisfied from a preponderance of the evidence that there was a lake immediately north of lots 3 and 4 in section 34 and lots 1 and 2 in section 35. * * * But if you believe from the evidence that there was a swamp or marsh instead of said lake immediately north of and adjoining said lots, then you will find for the defendant; in other words, it is a fact for you to determine whether or not that was a lake." Other instructions of a like nature were given, but these fairly illustrate the whole.

WOLVERTON, *C. J.*:

It has become a settled rule of law in this State that, where a stream is meandered by the public surveys, the stream, and not the meander line, is the true boundary of the riparian owner: Weiss *v.* Oregon Iron &c. Co., 13 Or. 496. The rule is alike applicable where a lake is meandered by the public survey. The shore of the lake becomes the real boundary of the abutting fractional subdivisions, or lots, as they are termed, and not the meander line as surveyed, if there is found to be a discrepancy between the two: Hardin *v.* Jordan, 140 U. S. 371; Mitchell *v.* Smale, 140 U. S. 406. The reason which prompted the rule is the difficulty which always exists in meandering exacting the edge or margin of a stream or lake or other natural body of water, owing to irregular projections and the various sinuosities of the water line; hence, the meander line is supposed to be run by exclusions and inclusions of such irregularities of contour, so as to produce an average result, closely approximating the true and real quality of upland contained in fractional subdivisions or lots bordering upon the water front. It was said by Mr. Justice Clifford, in Railroad Company *v.* Schurmeir, 7 Wall. 272, "Meander lines are run in surveying fractional portions of the

public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser, in preparing the official plat from the field-notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water-course, and not the meander line, as actually run on the land, is the boundary." As we have seen, the same rule applies to lakes. The banks of the stream and the shores of the lake constituted monuments which serve to mark the true boundary, and they should ordinarily prevail, under the general rule, as against courses and distances. Mr. Justice Bradley, in Mitchell *v.* Smale, *supra*, states the doctrine clearly: "The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow." This doctrine was recognized and adopted in Barnhart *v.* Ehrhart, (Or.) 54 Pac. 195.

It is a question of no moment to the parties in the present controversy whether the shore or upland owner takes to the water's edge, or to the center of a non-navigable lake, or what title, if any, has been acquired by reason of such ownership without reservation in the muniments of title to the land under the water of the lake, as in any event the owner is entitled to all land between the original line and the water's edge, which shall have become bare by accretion or a gradual and imperceptible recession of the water, not extending beyond the center of the lake. In this, counsel for the parties, as we understand them, concur; so that there is little need of our discussing the question, and we shall do no more than denote briefly the reasons upon which the doctrine rests. The one generally given is that the owner is subject to the loss of soil by the encroachment of the water, hence, that he should have the benefit of accretions on account of its recession, and thus, upon a general average, the gain will balance the loss, and *vice versa*.

The maxim "*de minimis non curat lex*" is also applied. Another, and, perhaps, a more cogent one invoked, is that it preserves the fundamental riparian rights, which often constitute the principal value of the land—of access to the water. These principles find support in the following authorities: Minto *v.* Delaney, 7 Or., 337; Hardin *v.* Jordan, *supra;* Mitchell *v.* Smale, *supra;* Fuller *v.* Shedd, 161 Ill. 462; Poynter *v.* Chipman, 8 Utah 442; Jefferis *v.* East Omaha Land Co., 134 U. S. 178; Lamprey *v.* Metcalf, 53 N. W. 1139.

The real question of cardinal and pivotal concern arises upon the urgent and strong contention and argument of counsel for plaintiff, that the official survey of the lake, the approval thereof, and the official plots and maps made thereunder, showing the lake and the meander line thereof, conclusively establish the fact and location of the lake, so far as the rights of riparian grantees are concerned, and the Government and its grantees are estopped to deny the supposed fact as represented to the purchasers of abutting land. Mann *v.* Tacoma Land Co., 44 Fed. 27, supports this contention in its fullest signification; and Mitchell *v.* Smale, *supra*, may be said to sustain it.

Defendant's counsel denies that any hard and fast rule of the kind exists, but asserts that, even if it does, it can have no application in the present controversy, for two reasons: One, that the abutting or upland, represented by the lots to which plaintiff deraigns title from the Government, was swamp and overflowed land; that the title, under the patent from the Government, took effect by relation, as of March 12, 1860, the date when the swamp-land act of Arkansas was extended to Oregon; that the public survey having been made in 1877, subsequent to the passing of the title out of the Government, there could have been no representation by the General Government prior to sale that it bordered the lake or other natural body of water, hence estoppel could not apply. In this connection, the idea is also advanced that the grantee of swamp and overflowed lands takes only such as is of that special character, and that the land under the water, forming the bed of the lake, not being of that character, could not pass in any event; in other words, that the limit of the swamp must necessarily be the limit of the grant. The other is that there never existed a lake in front of or bordering upon the plaintiff's lots; that the question of fact involved is not one of accretion or recession of the water, and consequent reliction, but of the existence of the lake upon which plaintiff anchors its claim; that this question was submitted to the jury, and, as the verdict was against the plaintiff, it is now precluded.

We will not now attempt to determine whether the first reason assigned is sound or not, or whether any rule of law exists, based upon and in consonance with it, as it is not deemed necessary to a decision of the controversy.

The second reason, however, we deem quite sufficient and ample for affirming the judgment below. If there never was a lake in front of plaintiff's lots, or if one did not exist there at the time of the survey, then there was no natural object or monument marking the north boundary of said lots; hence, resort must be had to the secondary evidence, viz., the courses and distances, which are ascertainable from the plats and surveys, and they must prevail. The result is natural, and the land conveyed would be just what a mathematical calculation would produce from the field-notes of the survey of the fractional sections, and the supposed meander line.

We are not without authority for this view. Grant v. Hemphill, 59 N. W. 263, is a case very much to the purpose. That was tried in a court of equity, and the facts were found by the court. Rothrock, J., who wrote the opinion in the supreme court, says: "It appears, from a very decided preponderance of the evidence, that the land in controversy is not now, and probably never was, any part of a lake. It is true that some of the witnesses testify that the inlet of Mud lake extended up into the land. But there is no evidence that at or near the time of the survey, or since, there has been any body of water anywhere on the land, upon which to base a meandered line. Some of the land, like all bodies of land in that country, is low, flat, and marsh land, but the evidence shows that a greater part of the land claimed by Eaton is dry, tillable land, and that if it had been surveyed it would not have passed to the State under the swamp-land grant. * * * A riparian proprietor is one who owns land bounded upon a water-course or lake. The evidence in this case shows that there was not at the time of the Government survey, and is not now, any body of water east of the meandered line, on which to found any valid claim of land outside of the line, by accretion or reliction, or in any other manner. In the large mass of authorities collected and cited by counsel, we find no case which can be said to sustain a claim made upon any such a state of facts." We have had occasion to cite that case before, with approval of the doctrine there enunciated: Western & Hawaiian Co. v. Bank (Or), 57 Pac. 912.

Now, the plaintiff sought to sustain the fact of the actual existence of the lake in front of its lots and upon which they abutted at the time of the survey, and then to show a gradual subsidence of the water of the lake, due to the cutting of the channel from natural causes, through a narrow reef or ridge extending across between Malheur and Harney lakes, by which the water of the former was drawn off into the latter, and a consequent reliction of the land bordering said lots, which constitute the land in dispute and to which plaintiff claims title. The defendant controverted this position, and sought and introduced evidence tending to show the non-existence of such a lake at the time of the survey, and at all times since; in short, there was support for the whole of his contention. The fact of the existence of Malheur lake, a non-navigable body of water, was admitted; but there was evidence to show that it lies to the northeast of the lots of plaintiff, and that no part of it now, or at the time of the survey, extended westward, in front or to the north of them. Several witnesses testified, in effect, that there was no open body of water of any moment in front of the lots; that the land was low and flat; that a portion of it was of a marshy or swampy character, but much of it, perhaps the greater portion, was dry and not covered with water, except at certain seasons of the year, when the water was unusually high, and that it was the same character of some of the land that is comprised within the boundaries of said

lots, and that this condition of affairs has existed since prior to the survey of 1877. Many circumstances were related, tending to support the truth of the testimony. The issues of fact were clear and distinct, and, having been submitted to the jury, there is no reason why their verdict should not preclude the plaintiff, as in other cases where a jury has passed upon a submitted question of fact.

If it be said that the result is a collateral impeachment of the Government survey, the answer is decisive that the Government ought not to be precluded by a meander line, which does not approximately and by general average border the banks of the stream or the shores of the lake which it is the purpose of a public survey to meander. If there was no lake to meander, the purchaser could not have bought upon the representation of the Government that there was, and can not become a riparian owner, and, therefore, can claim none of the rights appurtenant thereto. So, turn the matter which way we will, the facts do not present a case which, under the usual reasons assigned, will preclude the Government or its grantees. The result, that the plaintiff should acquire by the purchase of these lots several multiples of their area, as was remarked by Mr. Justice Brewer, in his dissenting opinion in Mitchell *v.* Smale, *supra*, is "certainly suggestive," and the case ought to be a clear one to support and sustain it. The instructions to the jury were in accord with the views here entertained, and hence there was no error in giving them.

There was evidence introduced, over the objection of the plaintiff, touching the declaration of Peter French, an officer and stockholder in the plaintiff corporation, to the effect that he or the company did not own the land in front of the lots, and that this was one of the inducements for the defendant to enter upon and occupy it. It is claimed that this was admitted under the allegations of the answer, by which it was sought to estop the plaintiff to claim the land; that the answer was entirely insufficient for that purpose, and hence that the evidence was wholly irrelevant and therefore hurtful. Whatever may have been the issue in that regard, there was a claim for damages, and the evidence had a material bearing upon that question; hence, there was no error in the premises.

During the course of the presentation of the defendant's case, the plaintiff objected to a certain interrogatory propounded to one of his witnesses, and the objection being sustained, defendant's counsel was permitted to state to the court, in the presence of the jury, what the testimony was that he expected to elicit by the question; and this was assigned as error. It is usual in the trial of causes, where a party is desirous of introducing testimony, and is overruled when the question is asked touching it, for counsel to state to the court what he expects to prove by the witness; and this he does for the purpose of saving the proper exception and making his point clear to the appellate court. A statement of that character, in the presence of the jury, has never been held, as we are aware, to constitute reversible error.

One of the defendant's witnesses was permitted to testify touching the fact that he had raised grain upon the land situate to the north of the meander line, but not in front of the plaintiff's lots, and this is assigned as error. The pivotal question before the jury, as we have seen, was whether a lake existed in front of these lots, and this testimony was pertinent to that issue, and there was, therefore, no error in permitting it to go to the jury.

These considerations affirm the judgment of the court below, and it is so ordered.

In the Supreme Court of the State of Oregon

Assignment of Error

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff

vs.

ALVA SPRINGER, Defendant

The plaintiff, by its attorney and counsel, in connection with its petition for writ of error in this cause, says that the judgment of the supreme court of the State of Oregon given and rendered herein, is erroneous and prejudicial to the rights of the plaintiff in the particulars following, that is to say:

1. The said supreme court erred in sustaining the ruling of the circuit court of said State under which G. Marshall, a witness for the defendant was allowed to testify and did testify upon the trial of this cause in said circuit court, over the objection of the plaintiff, that he, the said Marshall, had raised grain upon land lying between the meander line of Malheur lake as surveyed and platted by the United States Government, approved by the Land Department of the Government, and on file by the United States land office at Burns, and the margin of the lake as it actually existed, to which said testimony the plaintiff objected at the time it was offered before said circuit court, that it was immaterial, the said circuit court overruled the objection and that ruling was excepted to and assigned as error in the said supreme court.

2. The said supreme court erred in sustaining the ruling of the said circuit court under which ruling L. B. Springer, a witness for the defendant, was allowed to testify upon the said trial in said circuit court, over the objection of the plaintiff, that he the said L. B. Springer had raised garden- upon land lying between the meander line of Malheur lake aforesaid and the water of said lake to which said testimony the plaintiff objected at the time it was offered upon the ground that it was immaterial, the said circuit court overruled the objection, and that ruling was excepted to and assigned as error in the said supreme court.

3. The said supreme court erred in sustaining the ruling of the said circuit court, under which ruling said L. B. Springer was allowed to testify, over the objection of the plaintiff, that gardens were raised upon places north of the meander line of said Malheur lake, upon the land north of the meander line and west of the land in dispute in this action, to which testimony the plaintiff objected at the time it was offered before said circuit court upon the ground that it was immaterial, the objection was overruled by said circuit court, and that ruling was excepted to and assigned as error in the supreme court.

4. The said supreme court erred in sustaining the said circuit court in its charging the jury as follows: "I instruct you that the fact that there may have been a meander line along the northern boundary of lots 3 and 4 in section 34, and lots 1 and 2 in section 35, township 26 south, range 31 east, Willamette meridian, is not conclusive evidence of the existence of the lake; you will therefore weigh and consider all the evidence in this case, and from the whole evidence determine the fact as to whether or not there was in reality a lake north of and adjoining said lots; and if there was not such lake, you will find for the defendant." Which ruling was excepted to by plaintiff at the time it was given, and was assigned as error in said supreme court.

5. The said supreme court erred in sustaining the said circuit court in its charge to the jury that the meander line established by the Government of the United States was not conclusive as to the place of the border of the lake; and that the jury must determine from all the evidence whether that place was the border of the lake at the time the Government survey was made; which ruling and charge was excepted to by the plaintiff at the time it was given, and was assigned as error in the said supreme court.

6. The said supreme court erred in sustaining the ruling of the said circuit court in its charge to the jury that the official maps and plats of the United States surveys showing the existence of Malheur lake, and its meander line along its southern boundary, together with the field-notes of said survey, were not conclusive evidence of the existence of such lake, or of the line of its shore.

7. Said supreme court erred in not adjudging and deciding that the official plat of the United States surveys, and the field-notes thereof, showing said Malheur lake and the meander line thereof, were conclusive evidence of the existence of said lake and of the place of its boundary.

8. Said supreme court erred in sustaining the ruling of said circuit court by which said circuit court refused to charge the jury, at the request of the plaintiff, as follows: "You are bound to find this lake boundary to be where the plat of the survey, and the field-notes of the Government survey, have designated it to be." Which refusal so to charge was excepted to by plaintiff, at the time, and was assigned as error in said supreme court.

9. Said supreme court erred in sustaining the ruling of said circuit court by which said circuit court refused to charge the jury, at the request of the plaintiff, as follows: "The Government by the aid of its proper officers has the right to fix and declare the place of the lake for the purposes of the survey and sale of the lands; and after that place has been so designated by such survey, and such survey approved and acted upon by the Government, such survey cannot, after the rights of third parties have intervened, be questioned or contradicted." Which ruling was excepted to by plaintiff, at the time, and was assigned as error in said supreme court.

And the plaintiff now prays that the judgment of said supreme court be reversed, and that a judgment be ordered in favor of plaintiff.

WILLIAM LAIR HILL,
Attorney of Plaintiff.

In the Supreme Court of the United States. October term, 1901. The Frenchi-Glenn Livestock Company, plaintiff in error, *vs.* Alva Springer. No. 124. Brief for the plaintiff in error.

Statement

In the year 1877 the officers of the Interior Department surveyed certain lands in the State of Oregon lying contiguous and near to a large non-navigable body of water called Lake Malheur. The plats were duly approved and placed on file in the proper local land office, and have never been withdrawn, canceled, or otherwise discredited by the Government. The surveyed lands were sold and otherwise disposed of with reference to the plats of 1877. Certain tracts, designated as lots 3 and 4 in sec. 34, and lots 1 and 2 in sec. 35, T. 36 S., R. 31 E., were patented to the State of Oregon under the swamp land grant of March 12, 1860, and the title so conveyed has come to the present plaintiff in error (pp. 32, 33).

These lots were represented on the plat of 1877 as bounded on the north by the waters of Lake Malheur. It appears that, in November, 1896, there was a body of dry land lying between the north boundary of the said lots, the meander line of the survey, and the then actual water line of the lake, and that the defendant Springer had occupied such intervening tract. The plaintiff in error brought suit, in one of the courts of Oregon, against Springer, to recover possession of this tract, claiming it as accretion to the patented land above mentioned. Defendant answered, denying plaintiff's title, and, by way of special defense, alleging (p. 5):

"That said pretended meander line was run or surveyed in the year 1877, and that a new meander line was run through that part of the county in 1895, varying materially in much of its course from that run in 1877, and that neither of them was actually run along or near the margin of said lake anywhere in the vicinity of the tract

described in the complaint, but that each of said lines was run a mile or more from the actual margin of said lake, leaving a tract of public land comprising many hundreds of acres, well adapted to agricultural purposes, between said alleged meander lines and the margin of said lake, unsurveyed of which the tract here in controversy is a part; that said lands are in the same general condition, and of the general character that they were when said meander lines were run; that for a long time prior thereto, and ever since there has been as defendant is informed and believes, no appreciable recession of the waters of said lake, nor have there been any appreciable accretions of land along that side of said lake nearest the land in controversy; the lands here claimed are not accretions, nor are they lands made suitable for agriculture by the recession of the waters of said lake since plaintiff acquired title to any of the lands adjoining them or since said surveys."

Issue having been joined, the cause came on for trial in May, 1897. Plaintiff proved its title to the patented land and put in evidence the plat of 1877 (pp. 32 *et seq.*). It also produced evidence tending to show that Lake Malheur had, at the date of that survey, extended as far as the meander line fixed on that plat, and that the water had, from various causes, receded, during the intervening twenty years, to its present stage (pp. 34 *et seq.*). The character and extent of defendant's evidence are thus stated in the opinion of the Supreme Court of the State (p. 54), though the record does not otherwise show such evidence:

"On behalf of the defendant, evidence was introduced tending to show that there never was a lake in front of the said lots; that Malheur lake is a well-defined, natural body of water, but that, if the east and west exterior lines of said lots were extended north indefinitely, they would not touch or intersect the margin or border of said lake, but would leave it entirely to the east thereof; that the water of the lake had been, from a time prior to 1877, of about the same height as it was at the date of trial; that the border of the lake never at anytime extended to the supposed meander line of 1877, and that there never had been any recession of the water of the lake and a consequent reliction of land in front of the said lots."

At the close of the evidence, the trial court, at the request of the defendant and over the exceptions of the plaintiff, gave to the jury a series of instructions to this effect:

That the government plats were not conclusive evidence that a lake existed north of the land sold to the plaintiff;

That the jury should find for the defendant unless convinced that there "was in reality a lake north of and adjoining said lots" belonging to the plaintiff; no date being fixed as that at which the lake must have washed the lots;

That the verdict must be for the defendant, unless that sometime not at all indicated), the jury found a lake to have existed "immediately north" of the said lots;

That if the jury found that a swamp or marsh had been "immediately north of and adjoining the said lots," then the verdict must be for the defendant;

That, before the plaintiff could succeed, the jury must be convinced that, on March 12, 1860, the date of the swamp land grant to the State, "said lots were bounded on the north by the waters of Malheur lake";

That the verdict must be for the defendant unless the jury were satisfied by a preponderance of the evidence that the lots named "bordered on the meander line," and that "the waters have receded and left the lots described in the complaint * * * as accretions to said land" (pp. 51, 52).

Under these instructions verdict passed for the defendant and judgment was entered thereon. That judgment having been affirmed by the Supreme Court of Oregon, a writ of error brings the case here. The opinion of the appellate court is in the record (p. 52).

Supreme Court of the United States. No. 124. The French-Glenn Live Stock Co., Plaintiff in Error, *vs.* Alva Springer. Defendant's Brief.

Statement of the Case

This is an action in ejectment. In April, 1877, a government survey was made of certain lands in Harney County, in the State of Oregon, and a meander line was established around what is called on the maps and plats, Malheur Lake. That survey also established the lines of the lots hereinafter described. In 1889 the plaintiff's grantor purchased from the State a small tract of swamp land described as lot 3, of section 34, and in 1890 another tract of the same kind of land known as lot 4, in section 34, and lots 1 and 2, in section 35. These lots lie just outside this meander line as located along the south side of Malheur Lake, as it appears on the maps and plats, and immediately north of them, inside of the meander line, is the property in question in this case.

These lots were patented to the State as swamp land, after plaintiff's grantors had purchased them from the State. That purchased in 1889 was patented in 1890, and that purchased in 1890 was patented in 1895. The defendant went upon the land involved about nine years before this action was begun, fenced it in, built a small house, and has made it his home ever since.

The plaintiff, being thus the owner of these few acres, lying as a narrow strip along the meander line, by virtue of that ownership claims title to all the land in front of its possessions, inside the meander line, to the centre of a lake as represented on the maps and plats made from the survey of 1877, as above referred to, and under that claim brings this action.

The plaintiff, after introducing its muniments of title—the government survey, showing the location of the meander line, and the

government maps and plats, showing Malheur lake, as if bounded by the meander line and covering the land in question—introduced oral evidence for the purpose of showing that in 1877 the lake was, in fact, as represented on the maps and plats, and that since that time the water had receded, exposing the land in controversy. The defendant introduced evidence showing that there was no lake in front of the plaintiff's land, and never had been; that at most a part of it was a swamp during a part of the year, and the remainder was hay land, and that all of it was sometimes temporarily covered with water during the spring thaw or in times of unusual high water; that Malheur lake was away off, a mile and a half or two miles to the northeast, *and that if the east and west lines of plaintiff's land were extended indefinitely neither of them would come within a mile and a half of the lake.* The case was submitted to the jury upon the issue of fact *as to whether there was any lake* in front of plaintiff's lots; the jury found there was *not*, and returned a verdict for the defendant.

The case went to the Supreme Court of the State of Oregon on a bill of exceptions (p. 14 *et seq.* of the Record) taken by plaintiff and was decided in favor of this defendant, on the ground that if there was no lake at all which could be the natural boundary, then resort must be had to the meander line as evidence of what was the boundary, and that the government and its grantees could not because of a represented meander line be precluded from showing that there was in fact no lake whatever; and that, therefore, the question of lake or no lake was properly submitted to the jury, and the jury's finding of fact was conclusive (pp. 55–57 *et seq.*, Record).

The case comes here on writ of error. The errors assigned will be found on page 62 of the Record.

5. Field Notes—Plaintiff's Exhibits 44–A to 44–P, inclusive

Plaintiff's Exhibits 44–A to 44–P, inclusive, being a certified copy of the field notes in connection with the meander line of 1877, were admitted into evidence. (R. 2341.)

Mr. LILJEQVIST. Simply for the record, I think they are immaterial in this case. (R. 2341.)

a. Plaintiff's Exhibit 50; Index Map, Plaintiff's Exhibit 51

Plaintiff's Exhibit 50, being an index map to field notes contained in Plaintiff's Exhibits 39–A to 39–K, inclusive, and Plaintiff's Exhibits 44–A to 44–P, inclusive, was admitted into evidence.

SPECIAL MASTER. An index map to be supplied by Mr. Pecore.

Mr. PECORE. There will be an index map and a diagram to substitute here in connection with that one on this larger scale.

SPECIAL MASTER. It is an index map and a diagram after the manner of Plaintiff's Exhibit 49, but larger.

Mr. PECORE. The index map is altogether a separate piece (R. 2345) of paper from the diagram.

SPECIAL MASTER. Let's have the diagram as Plaintiff's Exhibit 50, and your index map as Plaintiff's Exhibit 51. (R. 2346.)

6. Plaintiff's Exhibits 45–A to 45–L, inclusive, being Plats of Meander Line around Harney, Mud and Malheur Lakes

Plaintiff's Exhibits 45–A to 45–L, inclusive, being the plats of the meander line around Malheur, Mud, and Harney Lakes, including the plats of the meander line of 1877, were admitted in evidence. (R. 2341.)

C. MEANDER LINE OF 1895—NEAL

EVIDENCE RELATING TO

1. Contour Survey of 1931

a. In General

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

The Neal meander line was closed all around Malheur Lake, and it is complete (R. 2265) in that Mr. Neal ran a continuous line of meanders from a point on the Sand Gap, or Sand Reef, in T. 27 S., R. 30 E., along the south side of Malheur Lake, and thence north along Malheur Lake, then west along the north side of Malheur Lake, and the north side of Mud Lake, back to the meander corner of Sections 31 and 35, T. 26 S., R. 30 and 31 E., setting corners on it.

We found substantially all the meander corners Mr. Neal set. I do not know how many we failed to find but the percentage is very, very small. (R. 2266.)

2. Distances

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

The line of levels were carried from our starting point, the Coast & Geodetic Survey bench mark, and extending southerly from that point along the Neal meander line, thence westerly along that meander line to the State bench mark at the Narrows; thence from the United States Coast & Geodetic Survey bench mark along the Neal meander line on the north side of Malheur Lake to the same State bench mark at the Narrows, in lineal feet that would be about 33 miles along the south of Malheur Lake and about 29 miles along the north side of Malheur Lake. Those distances may be reversed but the total perimeter of Malheur Lake is approximately 62 miles by the Neal meander line. (R. 78–79.)

The error in that circuit of 62 miles was 34 hundredths of a foot, approximately, or .344 of a foot, or about 4½" in 62 miles, which is within the requirements of the United States Geological Survey second order levels, and we attempted to keep our leveling work within their requirements as to accuracy. (R. 79.)

Our adjusted elevation of the bench mark at the Narrows is 4095.868. (R. 85–87.)

3. Elevations

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

The minimum elevation of the 1895 meander line run by Neal is where it crosses the Silvies River and it is between 4086 and 4087 feet, but it is only at that elevation for a distance of about ten feet.

The maximum elevation of that meander line is 4096 feet in section 27, T. 26 S., R. 32 E. south of Malheur Lake and the mean elevation thereof is approximately 4093 feet. (R. 87–88.)

The elevation of the meander line of 1895 where it crosses the Silvies River is lower than it is at the lake. There is a very peculiar condition there because apparently the Silvies River flows up hill for at least 2½ miles into Malheur Lake. This river at the 1879 meander line is nearly 4 feet lower than at any point in the bed of Malheur Lake proper and 5 feet lower than what might be properly termed the mouth of the Silvies River. (R. 88–89.)

The mean elevation of the Neal meander line, as nearly as we were able to determine it, is 4,093 feet. (R. 95.)

4. Instructions to Government Surveyors

a. Meander Lines

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

I am familiar with the instructions issued by the United States Government to surveyors in the Manual of 1884 and I know of no rule or regulation of the General Land Office of the United States which requires surveyors in meandering lakes, streams, or rivers, to use levels or run contour lines. (R. 2271.)

A meander line is supposed to follow the water line of a body of water, and the water is the best contour line that you can get.

No instructions are issued by the General Land Office to surveyors with reference to requiring levels or contour lines.

While in Washington, D. C., several months ago, I spent four or five days in the Land Office looking for old records relating to this case and I did not find anything I looked for. The principal thing I found concerning the special records relating to Malheur Lake was an indication that they had been placed, years ago, in what was

known as a special file in the Land Office; all the papers and correspondence coming in from various people relating to these surveys, including communications with Members of Congress and a lot of preliminary maps and blue prints which had evidently been sent in there, had been collected and put in a special file, but what became of that (R. 2276) file we could not determine and could not find out. Those papers that I saw there, whatever they were, was not the complete file of this area (R. 2276), and I could not find the rest of them, and could not ascertain where they were. (R. 2277.)

While there I do not remember that I looked particularly for an inspection report after the Neal survey was made to check his survey, but it was the general practice of the General Land Office at the time his survey was made to send to the field what was called an examiner of surveys to examine the technical correctness of the work; that is, to find if the lines had been run as they were reported to have been run; and to see if the corners had been substantially monumented with durable material as reported in the field notes. (R. 2273–2274.) I derived that information in connection with my work there in the Land Office; perhaps 75% of my time was spent working on old survey cases and my duties made it necessary for me to dig out and examine all of the records that could be found in the Land Office concerning them. In examining those cases, I found that usually, if not invariably, it was the practice to follow the procedure I have outlined with reference to having a survey examined. (R. 2274.)

In 1895, there was not a permanent corps of engineers in the employ of the General Land Office. It was the general practice to check up in the manner I have testified.

I did not find such a report in the files in the General Land Office relative to the Neal meander survey of 1895 (R. 2275) but I am willing to state that there certainly was a report, or this survey would not have been passed by the Land Office, because in accordance with their general practice, it unquestionably was examined in the field (R. 2275) by the examiner of surveys.

I did not find the vast majority of the papers relating to this case, and I did not find any protests that would imply that the survey had been inspected by an examiner of surveys. (R. 2276.)

b. Instructions to Mr. John H. Neal—Plaintiff's Exhibit No. 38

Mr. BLACKMAR. I desire to offer in evidence Plaintiff's Exhibit 38, which is a certified copy of the instructions dated June 8th, 1895; July 5th, 1895; and October 18th, 1895, of certain instructions issued to John H. Neal, for his guidance in the execution of the surveys under his contract 634, dated June 1st, 1895.

SPECIAL MASTER. It will be admitted into evidence.

(Thereupon the said document was by the reporter marked "Plaintiff's Exhibit 38".) (R. 2055.)

PLAINTIFF'S EXHIBIT #38

(50)

OFFICE OF U. S. SURVEYOR GENERAL,
Portland, Ore., June 8th, 1895.

J. H. NEAL, ESQ.,
U. S. Deputy Surveyor, Diamond, Oregon.

SIR: In prosecuting the surveys embraced in your contract, No. 634, dated June 1st, 1895, your attention is directed to the requirements of the Manual of 1894. and the following

SPECIAL INSTRUCTIONS

You will extend the lines of the public surveys as now established in the several townships bordering Lake Malheur, from the *present meander* line of said lake to the *present* shore line. In prosecuting this work, you will, in accordance with instructions received from the Hon. Commissioner of the General Land Office, commence on or after the 1st day of October, 1895, and complete all work before the 1st day of March, 1896.

Blue-print diagram, forming a part of these instructions is attached hereto; also, copy of field notes of subdivisional and meander lines, as now established, for your information.

Malheur Lake has been meandered, entire, excepting that portion in T. 26 S., R. 31 E., north of the lake.

You will commence the work embraced in your said contract, at the south terminus of the west boundary of this Tp. and run south on a true line, setting the proper corners at 40 and 80 chs., respectively, from the last sec. cor. on the north, and a closing cor. at intersection of the north shore line of the lake, or the meander line now existing on the south side of the lake, as the case may occur. To complete the south boundary of this Tp., you will commence at the west terminus thereof, and run west on true line, setting the proper corners at 40 and 80 chs., respectively, from the last sec. cor. on the east, and a closing Tp. cor. at intersection of the above described south true line.

In general, run all lines on the north or the south side of the lake, whether exteriors or subdivisions, toward the present shore line of the lake, as north or south true lines, setting the proper corners at 40 and 80 chs., respectively, from the last sec. cor. established on such line, and a closing cor. at the present shore line, or the south meander line of the lake, as the case may be. On the east of the lake, begin at the west terminus of all lines, whether exteriors or subdivisions, and extend them west as true lines to the lake, setting the proper corners at distances above described, and a closing cor. at the intersection of the present shore line. In a similar manner you will run the subdivisional lines on the west of the said lake, east, observing that in all cases where section corners may be established on any two or more lines, before intersecting the present shore line,

you will run on random lines between such corners, and correct back on true lines.

You are especially directed to a careful consideration of plates 7 and 9 of the Manual of 1894.

Meanders

You will carefully define the present shore line of said Malheur Lake, by running a new meander line in accordance with requirements found on pages 56, 57, and 58 of the Manual of 1894.

Your especial and careful attention is called to page 66 of the Manual of 1894, under heading "Speciman Field Notes." In the preparation of your notes you are directed to conform *strictly* to these instructions, and you are notified that this office will adhere to these instructions absolutely.

In prosecuting your work in the field, should you find the condition of prior surveys to be materially different from that shown by the field notes and plats of such surveys, or should any error of sufficient magnitude, from any cause develop itself, you will at once notify this office, to the end that other and supplemental instructions may be forwarded to you, if deemed necessary.

In nearly, if not quite all, cases the Manual of 1894, will prove a sufficient guide.

Very respectfully,

(JOHN C. ARNOLD) (Signed)
U. S. Surveyor General, Ore.

(51)

OFFICE OF U. S. SURVEYOR GENERAL,
Portland, Oregon, July 5, 1895.

JOHN H. NEAL, Esq.;
U. S. Deputy Surveyor, Diamond, Oregon.

SIR: I am instructed by the Hon. Commissioner General Land Office, to issue to you the following Supplemental Instructions, that will govern you in the prosecution of surveys under your contract, No. 634, dated June 1st, 1895:

The dates named for the execution of the work, viz; between October 1st, and March 1st, the period of lowest water, indicate a purpose to push the extension of the lines to an extreme limit, which would result in the whole new meander line and its corners being destroyed by high water. You are therefore instructed to establish the new meander line at *mean high* water mark. The Hon. Secretary of the Interior, in this case, permits the survey of all *dry land* between the meander and shore line, and nothing in his decision contemperates a departure from the *regular* method of meandering shores.

Also, your attention is particularly called to the fact that it is important that the surveys included in your contract be perpetuated in a durable manner. You are, therefore, specially instructed to

establish *all* corners included in the surveys embraced in your contract, in a substantial and permanent manner, using *stone* wherever it can be procured, and build large monuments of this material wherever it can be done. When posts are used, they must be a good, sound, durable wood, and firmly planted. You will exercise great care in the establishment of *all* corners, and see to it, that the *best* material at all times is used, to the end that the work embraced in your contract may be of the most permanent character.

Very respectfully,

(Signed) JOHN C. ARNOLD,
U. S. Surveyor General, Oregon.

U. S. SURVEYOR GENERAL'S OFFICE,
Portland, Oregon, October 18th, '95.

To JOHN H. NEAL,
U. S. Deputy Surveyor, Narrows, Oregon.

SIR: In compliance with directions received from the Hon. Commissioner General Land Office, I issue you herewith the following special instructions regarding the reestablishment, or the resurvey of the missing and obliterated lines and corners around Lake Malheur, and contiguous to surveys embraced in your contract No. 634, dated June 1st, 1895:

In no case will lines be reestablished or resurveyed unless you can show the absolute necessity therefor, in connection with the prosecution of surveys embraced in your contract No. 634.

Your notes of reestablishments and resurveys you will transmit to this office in separate book, and independent of the returns under your contract.

In the prosecution of this work, you will be guided by the Manual of 1894. (See pages 71, 74, and 179, 182 of Manual; also plate VII.)

You will return the true field notes of all reestablishments and resurveys necessary in the execution of your contract No. 634, stating explicitly the necessity for the work, and said notes will be properly attested by yourself and assistants in the regular manner.

The total liability for all resurveys of lines and reestablishments of corners surrounding Lake Malheur is $300.00, and will be paid, for from the appropriation of $15,000.00 for resurveys for the fiscal year ending June 30th, 1896.

Very respectfully,

(Signed) JOHN C. ARNOLD,
U. S. Surveyor General for Oregon.

c. Excerpts from the "Manual of Surveying Instructions" of 1894 (Plaintiff's Exhibit No. 41)

Mr. BLACKMAR. I desire to offer in (R. 2056) evidence, and this may be copied into the record by the reporter, because this is a book, and there are very few of them in existence.

The book is entitled, "Manual of Surveying Instructions," for the surveying of public lands of the United States, and private land claims, prepared in conformity with the law under the direction of the commissioner of the General Land Office, dated June 30th, 1894, bearing the imprint of the Government Printing Office at Washington, 1894.

On page 8, Plaintiff's Exhibit 41, in the last paragraph, commencing with the words "In 1875 a manual of instructions" and so forth, continuing down on page 9 to the end of the second paragraph, concluding with "surveying the public lands of the United States."

I offer the same book, commencing on page 56 under the subtitle "Meandering," commencing with the words "1. Proceeding down stream, the bank on the left," and so forth, all on page 57, all on page 58, concluding on page 59 with the paragraph entitled number 19, commencing with the words, "The magnetic declination," and ending with the words "identified in the field (R. 2057) notes."

SPECIAL MASTER. I should suggest that it not only be copied in the record, but the reporter make a separate copy, so that it will be an exhibit here.

Mr. BLACKMAR. Yes. (R. 2058.)

SPECIAL MASTER. It is only two or three pages.

Mr. BLACKMAR. That is right. And I think it may be well to let the record show that Mr. Neal is in attendance here in court. The Government sees no necessity for putting him on the witness stand, because we assume he recorded at that time what was then on the ground, and included it in his field notes. (R. 2058.)

PLAINTIFF'S EXHIBIT 41

(The following is a copy of the excerpts from the "Manual of Surveying Instruction," dated June 30th, 1894, commencing with the last paragraph on page 8:)

"In 1875 a manual of instructions to surveyors general was prepared, under the direction of the Commissioner of the General Land Office, by John M. Moore, then principal clerk of surveys, and the act of Congress approved May 30, 1862 (Sec. 2399 R. S.), provided 'That the printed manual of instructions relating to the public surveys, prepared at the General Land Office, and bearing the date February twenty-second, eighteen hundred and fifty-five, the instructions of the Commissioner of the General Land Office, and the special instructions of the surveyor general, when not in conflict with said printed manual (R. 2058) or the instructions of said commissioner, shall be taken and deemed to be a part of every contract for surveying the public lands of the United States.'

"The instructions contained in this volume are issued under the authority given in the clause in said act providing that 'The instructions of the Commissioner of the General Land Office * * *

shall be taken and deemed to be a part of every contract for surveying the public lands of the United States.'"

(The following is a copy of the excerpt from the "Manual of Surveying Instruction," dated June 30th, 1894, commencing with the subtitle "Meandering" on page 56 thereof, and concluding (R. 2059) with paragraph 19 on page 59 thereof:)

"1. Proceeding down stream, the bank on the left hand is termed the left bank and that on the right hand the right bank. These terms will be universally used to distinguish the two banks of a river or stream.

"2. Navigable rivers, as well as all rivers not embraced in the class denominated 'navigable,' the right-angle width of which is three chains and upwards, will be meandered on both banks, at the ordinary mean high water mark, by taking the general courses and distances of their sinuosities, and the same will be entered in the field book. Rivers not classed as navigable will not be meandered above the point where the average right angle width is less than three chains. Shallow streams, without any well-defined channel or permanent banks, (R. 2059) will not be meandered; except tide-water streams, whether more or less than three chains wide, which should be meandered at ordinary high-water mark, as far as tide water extends.

"At every point where either standard, township, or section lines intersect the bank of a navigable stream, or any meanderable line, corners will be established at the time of running these lines. Such corners are called meander corners,* and the deputy will commence at one of these corners, follow the bank or boundary line, and measure the length of each course from the beginning corner to the next 'meander corner.' Compass courses, by the needle or solar, will be used in meanders. Transit angles are not allowed.

"The crossing distance between meander corners on same line (R. 2060) and the true bearing and distance between corresponding meander corners will be ascertained by triangulation, or direct measurement, in order that the river may be protracted with entire accuracy. The particulars will be given in the field notes.

"In meandering water courses, or lakes, where a distance is more than two chains between successive stations, whole chains only should be taken; but if the distance is less than ten chains, and it is found convenient to employ chains and links, the number of links should be a multiple of ten, thereby saving time and labor in testing the closings, both in the field and office.

"3. The meanders of all lakes, navigable bayous, and deep ponds, of the area of twenty-five acres and upwards, will be (R. 2060) commenced at a meander corner and continued, as above directed for navigable streams; from said corner, the courses and distances of the entire margin of the same, and the intersections with all meander corners established thereon, will be noted.

* These corners are the regular meander corners, and designated "meander corners"; they are distinguished from special and auxiliary meander corners; see paragraphs 11 and 12, page 44, and pages 42 and 43.

"All streams falling into the river, lake, or bayou will be noted, and the width at their mouths stated; also the position, size, and depth of springs, whether the water be pure or mineral; also, the heads and mouths of all bayous; all islands, rapids, and bars will be noted, with intersections, to their upper and lower ends, to establish their exact situation. The elevation of the banks of lakes, bayous, and streams, the height of falls and cascades, and the length and fall of rapids will be recorded in the field notes.

"To meander a lake or deep pond lying entirely within the boundaries of a section, two lines will be run from the two (R. 2061) nearest corners on different sides of such lake or pond, the courses and length of which will be recorded, and if coincident with unsurveyed lines of legal subdivisions, that fact will also be stated in the field notes, and at each of the points where said lines intersect the margin of the pond or lake, a special * meander corner will be established as above directed. (See example, page 201.)

"The relative position of these points being thus definitely fixed in the section, the meandering will commence at one of them and be continued to the other, noting the intersection, and thence to the beginning. The proceedings are to be fully (R. 2061) entered in the field notes.

"4. Meander lines will not be established at the segregation line between dry and swamp or overflowed land, but at the ordinary high water mark of the actual margin of the rivers or lakes on which such swamp or overflowed lands border.

"5. The precise relative position of an island, in a township made fractional by a river or lake in which the island is situated, will be determined by triangulation from a special and carefully measured base line, initiated upon the surveyed lines, on or near the lake or river bank on the mainland, so as to connect by course and distance on a direct line, the meander corner on the mainland with the corresponding point on the island, where the proper meander corner will be established.

"6. In making the connection of an island lying entirely within a section, with the mainland, a special base will be measured from the most convenient meander corner, and from each base, the location of an auxiliary ** meander corner will be determined by triangulation, at which the meanders of the island will be initiated. (R. 2062.)

"7. In the survey of lands bordering on tidewater, 'meander corners' will be established at the points where surveyed lines intersect high-water mark, and the meanders will follow the high-water line.

"8. The field notes of meanders will show the dates on which the work was performed, as illustrated in the specimen notes, page

*A "Special Meander Corner" is one established on a line of (R. 2062) legal subdivision, not a standard, township, or section line. See pages 201 and 202.

**An 'auxiliary meander corner' is one not on a line belonging to the system of rectangular surveying. See page 212. (R. 2064.)

216. The field notes of meanders will state and describe the corner from which the meanders commenced, and upon which they closed, and will exhibit the meanders of each fractional section separately; following, and composing a part of such notes, will be given a description of the land, timber, depth of inundation to which the bottom is subject, and the banks, current, and bottom of the stream or body of water meandered. The utmost care will be taken to pass no object of topography, or change therein, without giving a particular description thereof in its proper place in the notes of the meanders.

"SUMMARY OF OBJECTS AND DATA REQUIRED TO BE NOTED

"1. The precise length of every line run, noting all (R. 2063) necessary offsets therefrom, with the reason for making them, and method employed.

"2. The kind and diameter of all bearing trees, with the course and distance of the same from their respective corners; and the precise relative position of witness corners to the true corners.

"3. The kind of materials of which corners are constructed.

"4. Trees on line. The name, diameter, and distance on (R. 2063) line to all trees which it intersects.

"5. Intersections by line of land objects. The distance at which the line intersects the boundary lines of every reservation, settler's claim, improvement, or rancho; prairie, bottom land, swamp, marsh, grove, and windfall, with the course of the same at all points of intersection; also, the distances at which the line begins to ascend, arrives at the top, begins to descend, and reaches the foot of all remarkable hills and ridges, with their courses, and estimated height in feet, above the level land of the surrounding country, or above the bottom lands, ravines, or waters near which they are situated. Also, distance to and across large ravines, their depth and course.

"6. Intersections by line of water objects. All rivers, creeks, and smaller streams of water which the line crosses; the distances measured on the true line to the bank first arrived at, the course downstream at points of intersection, and their widths on line. In cases of navigable streams, their width will be ascertained between the meander corners, as set forth under the proper head.* (R. 2064.)

"7. The land's surface—whether level, rolling, broken, hilly, or mountainous.

"8. The soil—whether first, second, third or fourth rate.

"9. Timber—the several kinds of timber and undergrowth, in the order in which they predominate.

"10. Bottom lands—to be described as wet or dry, and if subject to inundation, state to what depth.

"11. Springs of water—whether fresh, saline, or mineral, with the course of the streams flowing from them.

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* See 'Meandering', third clause of paragraph 2, page 57. (R. 2064.)

"12. Lakes and ponds—describing their banks and giving their height, and also depth of water, and whether it be pure or stagnant.

"13. Improvements. Towns and villages; houses or cabins, fields, or other improvements with owners' names; mill sites, forges, and factories, mineral monuments, and all corners not belonging to the system of rectangular surveying; will be located by bearing and distance, or by intersecting bearings from given points.

"14. Coal banks or beds; peat or turf grounds; minerals and ores; with particular description of the same as to quality and extent; and all diggings therefor; also salt spring and licks. All reliable information that can be obtained respecting these objects, whether they be on the line or not, will appear in the general description. (R. 2065.)

"15. Roads and trails, with their directions, whence and whither.

"16. Rapids, cataracts, cascades, or falls of water, with the estimated height of their fall in feet.

"17. Precipices, caves, sink holes, ravines, stone quarries, ledges of rocks, with the kind of stone they afford. (R. 2065.)

"18. Natural curiosities, interesting fossils, petrifactions, organic remains, etc.; also all ancient works of art, such as mounds, fortifications, embankments, ditches, or objects of like nature.

"19. The magnetic declination will be incidentally noted at all points of the lines being surveyed, whether any material change in the same indicates the probable presence of iron ores; and the position of such points will be perfectly identified in the field notes." (R. 2066.)

5. Mean High-Water Mark Conditions.

Mr. SIDNEY COMEGYS, called as a witness for the plaintiff, testified in substance as follows:

The Neal meander line north of the Dunn place was situated right below my place; I know just about where it is. There is nothing in the vegetation there that would point out the Neal meander line to me.

Mr. BLACKMAR. Q. That is, a person walking down there could not see a change of vegetation and say, "Here is the Neal line"?

A. No, sir. (R. 1448.)

Mr. ORA WINFIELD HILL, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Was there any change in the vegetation on your place which would indicate where the meander line was—the Neal meander line?

A. No, sir; not to my knowledge. (R. 1541.)

Mr. ARCHIE MCGOWAN, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Since you have been going down to the lake, and having seen the Neal meander line marked with those posts,

can you tell me whether or not there was any change in vegetation that would indicate where that meander line is? Do you understand what I mean?

A. I think I understand what you mean, but I haven't paid a great deal of attention to that. (R. 1561.)

Cross-examination:

Mr. LILJEQVIST. Q. And then do I understand you were on that eastern part of the lake, and that the salt grass was the kind of vegetation that grew up immediately where the ordinary water came to?

A. Yes; that was my observation, that that was what you would find.

Q. In other words, outside of where the Blitzen and the Silvies flowed into the lake and flooded it every spring, isn't it a fact the salt grass grew around the margins of the high water of the lake?

A. I would say that was correct. (R. 1567.)

Mr. WILLIAM DAVID HUFFMAN, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

There are places where the vegetation has changed above and below the Neal meander line, and there are places where it has not. (R. 1586–1587.)

Dr. LLEWELLYN EUGENE HIBBARD, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Doctor, directing your attention to those posts along the north side of Malheur Lake, and along the south side: Since you have been familiar with the lake, have you seen anything in the way of a change of vegetation which might indicate the Neal meander line?

A. No. The change is so gradual, and it has changed quite a bit in the period. I have been noticing that from the (R. 1602) changing of the seasons; and the settlers going there preparing for hay have made some changes, but it didn't have anything to do with the line, and there was nothing to indicate to me during any of that period that there was a marked line or bank; there was nothing to indicate to me where that line was, or anything whereby I could have told where it was. There were places that I would guess that anyone meandering the lake would have put it, because of the tules, and I would have put it in that position if I was going to try to outline what would be called the lake borders; but nothing in the way of vegetation. (R. 1603.)

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I could not do any more than Mr. Neal did in running his line at mean high-water mark at the place on the east side of Malheur Lake where his line is about one-quarter of a mile from the bank. I would simply have had to guess at it. I had no water around me.

I do not believe that the elevation between 4,093 and 4,094 between the Neal meander line and the bank on the east side of Malheur Lake has been caused by windblown sand or by the water that has washed sand up above the meander line. The wind blows to beat the band but there was a bank on that old meander line.

There was a bank on that old meander line when that was (R. 2268) run in 1877; Mr. Neal notes the same bank in the same position in 1895; in 1931 we found the same bank in the same position Neal reported it in, and in the face of that, I do not believe there has been very much change in the topography. I am not saying it is not possible for that to have built up to a slight extent since 1895 between the bank and the meander line. Anything is possible. The sand and dust are not as bad east of Pelican Island as they were west of it.

There are ripple marks on the eastern part of Windy Point. When you get in the blow sand east of that bank (R. 2269) there is a great deal of evidence of a change by wind. There is a great deal of blow sand through the entire area north (R. 2270) and northwest of Windy Point, and generally speaking there are ripple marks in the sand.

We have found a great deal of evidence of that sort in the Sand Reef itself. Between the meander line south of sections 32 and 33, T. 26 S., R. 31 E., north of Mud Lake, and in the meander line of Section 32 and part of Section 33, T. 26 S., R. 30 E., south of the lake, there are a few hundred acres that show every indication of having moved and changed a great deal by virtue of the wind having blown the sand there. (R. 2270.)

As far as the technical execution of Mr. Neal's work is concerned, as we found it by our retracements, and as far as the monumentation of his lines and corners was concerned, his work was excellent considering the class of work that was done by deputy contracting surveyors in 1895. Any man that would run a survey that day with the instruments and equipment that they had, and monumented the lines so that 35 years later you could find practically all of his corners within a few feet of where he said he put them, I would say that his job was well executed, as far as the instrumental work was concerned; but I do think Mr. Neal made a very serious misjudgment as to where the meander line should have been put, and especially along the north and west side of the lake. That is my judgment many years after the survey was made and after I have handled perhaps a hundred similar cases in the Interior Department. I am not saying where I would have run that line, either straight across the lake, farther north or farther south, but I could give it on that map, Plaintiff's (R. 2278) Exhibit No. 3, together with my reason. (R. 2278.)

I believe that the Neal meander line along the north side of Malheur Lake, for example, in T. 25 S., R. 32½ E., should have been

run in one place nearly two and a half miles farther south than he ran it.

At 4,093 feet elevation, the water did come through the western half of Malheur Lake to that Neal meander line in substantially most of the places, as my contour lines will show. (R. 2279.)

Mr. LILJEQVIST. Isn't it a fact when the water rose in the eastern part of that lake the big open body of water to 4,093 feet, that that water as a matter of fact did extend out through the flags and the tules out to this Neal meander line?

A. Yes; but the meander line is supposed to be run at the margin of a body of water, and not through flags and tules.

Mr. LILJEQVIST. We will let the court decide that, and not you.

Q. I asked you if it was not a fact when the water rose, if it didn't extend out to those flags and tules to the Neal line?

A. In places, it certainly did. (R. 2279.)

Q. Well, substantially and approximately around that entire body, and in some places beyond it?

A. In many places beyond it, Mr. Liljeqvist.

Mr. LILJEQVIST. Well, I claim in this case the Government is estopped, because the Government has accepted the survey to the part that was surveyed, patented it, and received payment for it, and under the Federal decisions it has no right to claim any right to go out farther. (R. 2280.)

SPECIAL MASTER. Mr. Pecore is just giving you his opinion.

Mr. LILJEQVIST. Yes. (R. 2280.)

When the overflow water rose to the 4,093 elevation, the water of the lake would pass the Neal meander line at a point where that meander line cuts the 4,093 feet; unless there was an island or peninsula in front of it to shut the water out.

The contours on the map, Plaintiff's Exhibit No. 3, will show that the rising waters will reach the Neal meander line at all those elevations unless there is something to shut the water out.

When the water rose to 4,094 feet it would go out through the tule area and the channels to the point where my contour (R. 2280) shows 4,094 feet on the map, Plaintiff's Exhibit No. 3. When the water got to 4,095 feet elevation, it would go to 4,095 contour elevations as shown on the map, Plaintiff's Exhibit No. 3. (R. 2281.)

6. Water conditions

a. In the early days

Mr. CHARLES R. PETERSON, called as a witness for the plaintiff, testified in substance as follows:

The place that I lived on, had possession of, and used from 1910 until 1924 was below the (Neal) meander line. During that period the water came up and covered part of it every year, the middle part. I will tell you how it was. There was a slough that ran through there; and there were tules and water on it, and on each side, and

also next to the meander line. (R. 680.) I had a house on it there. (R. 681.)

In order to cut hay you have to have water, but that time (1918–1919) I got too much water, it went way beyond the meander line there.

Mr. LILJEQVIST. Q. Now, it is a fact, is it not, Mr. Peterson, that at ordinary high seasons of that lake that the water did go up to the Neal meander line in that vicinity?

A. Yes, sir. (R. 685.)

Mr. GRANT THOMPSON, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Did the water come up on normal stages on the rise of the lake to that (Neal) meander line in front of your property?

A. The first year that I bought that place was in 1917 and I couldn't go down to the meander line on the lake. It was too wet. I have owned the property since 1917. Mr. Ausmus is below a part of my holdings and he has hayed from time to time, and I have seen the water there.

Mr. LILJEQVIST. Q. Have you been claiming riparian rights for your land?

A. Yes, sir.

Q. Of course you know there are no riparian rights unless the lake came to that meander line of Neal's don't you?

A. I am not familiar with it.

Q. But you have been claiming riparian rights?

A. Yes; but I want to tell you now, when I told you that I didn't, or that I couldn't cut to the meander line in the year I bought it, it has been done since.

Q. And there have been some years since 1917 you couldn't cut also?

A. Yes, sir.

Q. In other words, in 1917 it was too wet to get down to the meander line?

A. Yes. (R. 726.)

Q. And even a number of years since?

A. Not a number, but several.

Q. There have been several since 1921, isn't that a fact? (R. 727.)

A. There have been years since that, but I don't remember how many. (R. 727.)

Mr. SIMON LEWIS, called as a witness for the plaintiff, on cross-examination testified as follows:

Some springs the water would come up over the (Neal) meander line up on my deeded lands.

Mr. LILJEQVIST. Q. Would you say that the (Neal) meander line was as fair and reasonable approximate line for the water in the normal season in high water in the lake?

Mr. BLACKMAR. I presume that is qualified by what he has said that it would change from year to year.

SPECIAL MASTER. That has reference to the (Neal) meander line in front of his holdings?

Mr. LILJEQVIST. Yes, your honor.

A. I think something close to it.

Mr. LILJEQVIST. Q. When the Government was making its investigation on this subject, you were asked the question:

"Q. Take the period of from March to June when we have the highest water in the ordinary years (and we must not consider the exceptional years one way or the other) have you any way of telling me about the margin of the lake—the area of Malheur Lake? Would it extend to what we now know as the (R. 787) second meander line?"

And your answer was (according to a copy of your statement which I have in my possession):

"Well, it would go right to the second line."

The WITNESS. The second line? That is Mr. Neal's line?

Q. Yes. Now, is that answer substantially correct?

A. I wouldn't say it would go right to the second line.

Q. Didn't you testify like that?

A. I don't think so.

SPECIAL MASTER. I think that the word "testify" will be confusing.

Mr. COLLINS. He was not testifying to me, Mr. Liljeqvist. I was merely trying to get the basis of his knowledge.

Q. I am asking you if in response to this question did you not make this answer I read to you and I am handing you copy of your testimony which I will ask you to read?

Mr. BLACKMAR. There is no dispute about that. That was a statement taken from Mr. Lewis and he signed it, and it was given to the Government. We gave it to you; there is not any dispute about that.

Mr. LILJEQVIST. All right. (R. 788.)

Q. Do you still stand by the statement that you made to the Government in its investigation: That the waters of the lake in its ordinary seasons of high water came to the second meander line on your place?

A. And would not pass over it?

Q. Well, it passed over it, didn't it?

A. It would in some places. It would not be over it as far as that goes.

Q. You mean to say in the ordinary year when the lake backed up, the water went out to the Neal meander line, and some little distance out upon the deeded or patented lands of yours, is that correct?

A. It would go a little back of that patented land, or at least (R. 789) it did on mine.

Q. I am not trying to impeach him, I am trying to find out what his statement is.

SPECIAL MASTER. You used the word "testimony" and a judge would think that that was his prior testimony given here. (R. 789.)

Mr. WILLIAM J. DUNN, called as a witness for the plaintiff, testified in substance as follows:

The Neal meander line of 1895 runs through this Jim Caldwell homestead for about half a mile I think, across, and about 150 to 200 yards below that place, or north of it is the Neal meander line; I have observed things there in that field since 1885.

Mr. BLACKMAR. Q. How many years would you say that the water had failed (R. 824) to reach the Neal meander line?

A. Well, it didn't reach it this year. These dry years it has not reached it; but the average water would come up pretty close to it.

Q. But in the dry years it doesn't?

A. No. Of course, a year like this we didn't have any water; last year there was more water.

Q. How many years since 1885 would you say that the water stood, or sometimes reached the meander line of 1877?

A. There have not been very many years that it has reached that point.

It might have reached it in some places. The new meander line (Neal) is about right.

Mr. BLACKMAR. Q. From the standpoint of farming, your place is a little bit better located than some of the others because you get your water from the Blitzen?

A. Yes. That is, the land at the mouth of the Blitzen is that way. (R. 825.)

Mrs. EFFIE L. DUNN, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I taught my first term in the Sodhouse School District in 1895. Mr. Neal ran that meander line while I was teaching. I think I started in September and taught up to just before Christmas. (R. 855.) Then I taught a couple of months in the spring several years afterwards, I don't remember just when, but I taught in May and June, and at the latter time, I think the schoolhouse had been moved just a little farther east than it was when I taught there the first term. (R. 856.)

I know where part of the Neal meander line was run; not all of it, but some of it.

Mr. LILJEQVIST. Q. As a matter of fact, for a great many years the water of the lake backed up to the Neal meander line, and in many places onto the deeded land south of the meander line along the shore; didn't it?

A. I will tell you, that is kind of hard to tell how far that water might back up on the lake onto the deeded land, for this reason, that the water from the Blitzen River flows over that deeded land. Now,

our land in that locality is all watered by the waters of the Blitzen River.

Q. The trouble is for years that you have been a little afraid that if the water backed up to this (Neal) meander line you might lose your land; isn't that correct?

A. No, sir.

Q. Are you telling me that you do not claim any riparian rights, or any water proprietorship by reason of the backing up of the waters (R. 862) of the lake around your husband's land?

Mr. BLACKMAR. Just a minute. The Government has stated that there is no litigation involved in this case between the Government and the State of Oregon and any private individual; and I do not think Mr. Liljeqvist should at this time attempt to interject into this case an issue that is not here. We cannot try the water rights of the Blitzen River in this case.

A. Well, I will state this: We haven't got any meander line on those lands that we now live on; that is all deeded land, and there is no meander line to it.

There is patented land below us and our land does not border on the meander line. Mr. Smyth has 57 acres, or something like that, of deeded land just north of our north line. (R. 862.) He is on the (Neal) meander line.

Mr. LILJEQVIST. Q. Now, from your observation when you taught school, and otherwise, you are meaning to tell us that the water of the lake didn't back up to Mr. Smyth's north line?

A. I will tell you about that. I put in the fall, and the water wasn't there, and the hay crops were up, you see.

Q. In the spring it did come back in the normal seasons?

A. I didn't go over there in the spring (R. 863.)

Mr. J. W. BUCHANAN, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

In classifying those lands we had a plat of the meander line. It was patented land, and we just go in there to find out the general character of the land so as to place a valuation on it; we would look at what was patented or surveyed land.

I was in there classifying those lands in 1909, I think.

Mr. LILJEQVIST. Q. I want you to state, among those surveyed lands, whether in your judgment the normal high water in the spring came up to that (Neal) meander line?

A. I couldn't say whether it came to the meander line at that particular time, or not; but it did sometimes come to the (Neal) meander line, and sometimes farther out.

By farther out I mean farther out than the (Neal) meander line; in high water it came onto the patented lands farther in shore.

Mr. LILJEQVIST. Q. From your observation of the lands in looking at them, it was your opinion that the normal high waters of the lake backed up and irrigated to some extent the patented lands?

A. Yes, sir. (R. 929.)

Redirect examination:

At times it went above the meander line, and some years it didn't reach that line.

Mr. BLACKMAR. Q. So that there isn't anything very stable about that?

A. No, sir.

Q. And as you were going along that north side of the lake, there isn't anything in there on the ground that shows you where (R. 932) the lake commences and stops; that is, a bank, or anything of that kind?

A. No, sir; not on the west side.

Q. It just slopes right on down?

A. Yes, sir.

Q. In a gradual slope?

A. Yes; in a gradual slope.

Recross-examination:

Mr. LILJEQVIST. Q. And that salt grass was located where, approximately, with reference to the Neal meander line?

A. I suppose so; yes.

Q. Was it located fairly close to the Neal meander line when you observed it in the year 1909?

A. They went in as far as they could survey the lake, and established that last meander line. Mr. Neal established it there. That was established since I have been here.

Q. And in your judgment, in going over the land and classifying it for taxation purposes, what is your judgment as to whether that Neal meander line in that northwest area was approximately where it ought to have been? (R. 934.)

Mr. BLACKMAR. Well, I don't know as the witness can answer a question of that kind as to where it ought to have been. That would probably require some kind of an explanation as to where it ought to have been.

Mr. LILJEQVIST. I will put it this way: (R. 935.)

Q. From your judgment in classifying those lands, would you state whether the Neal meander line at the northwesterly line of the lake was approximately where the normal water came in the springtime in seasons of high water?

A. I think it was, as near as I could get at it. (R. 935.)

Redirect examination:

Some years the water would come above that line (Neal meander line) and some years it would be below it, I think.

Mr. BLACKMAR. Q. And in some places around the lake there were tules above the meander line, were there not?

A. Oh, yes.

Q. And in some places there is salt grass away below the (Neal meander line?

A. Oh, yes; there are places that they never surveyed.

Q. And where they cut hay?
A. Yes. (R. 936.)

Mr. JOSEPH WILLIAM CLARK, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Isn't it a fact during the ordinary season there when the water was in the lake, and backing up the lake, that the water went out to the Neal meander line, and also permitted Ruh to raise some crops on his surveyed land?

A. Why, yes; as you call it. Of course, there were no two years that I saw alike; but as you call it, yes. When there was sufficient water in the river to raise the lake, why, it would overflow the banks and flow down across Mr. Ruh's place and Mr. Showen's place and back on from there, and it would be clear from there to the lake, running on down to the lake, and back (R. 1038) around those sloughs.

Q. When the river quit running down there, didn't the lake back up?

A. No, sir.

Q. Didn't you make this statement (to the attorney representing the Government at the time he interviewed you in answer to this question, propounded during the interview):

"Q. Since you have been there, in the high-water period, say between March and June or July, has the water area, that is, the stand of water reached what is now the second meander line? I don't mean exceptionally dry or wet years.

"A. Yes, it would. When I lived down there it extended beyond that meander line.

"Q. How long would it be there?

"A. Two, three, or four months. (R. 1039.)

"Q. The rest of the year it began to recede and go down?

"A. Yes."

Isn't that what your statements (when you were interviewed) were?

A. Yes, sir.

Q. And is that statement correct?

A. Yes, sir, I think it is. (R. 1039.)

Mr. JOHN H. WITZEL, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I think the water runs down from the Blitzen River whenever it is high in high water, and overflows the John Marshall place and the Simmons place. The lake backed up onto them. (R. 1121.)

I know where the Neal meander line runs along by the Reinemann place and through in there, and the water crossed that line, and some years ran to the other meander line, or about.

Mr. LILJEQVIST. Q. In your judgment, Mr. Witzel, when you first went into the country from '95 on, did the water at ordinary high

periods in the spring of the year go up to the Neal meander line in front of the Reinemann place?

A. I think it would come probably, on an ordinary year it would come to the meander line. (R. 1122.)

Mr. LeRoy Bunyard, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I went in there in 1893 (R. 1147, 1163), but I do not know anything about conditions before that time. As I understood it, the north line of the George Thompson place, running east and west, was the Neal meander line. I cannot recall whether that was the south line of the Ruh place; I don't think Ruh owned it at that time, but he became the owner of it later.

Mr. Liljeqvist. Q. Where did the water come with reference to that line on the north side of the George Thompson place in the springtime?

A. Well, the water came there from the river in the channel. It ran around there on the north side of Mr. Thompson's house, and it got pretty deep, but I don't know whether it backed up to the (Neal) meander line or not. There was quite a lot of water in that channel.

Q. You don't know one way or the other?

A. No.

Q. You don't know whether the lake backed up from a foot (R. 1163) to four feet on the Ruh (Neal) meander line, or not in the springtime.

A. No, I couldn't say. (R. 1164.)

The salt grass line with reference to the George Thompson place was practically on top of the ridge, up quite a ways from the water line, the high-water line, quite a little piece; the distance varied, of course, in some places it was right close to it (the high-water line); in other places not so close, but I should judge the distance (R. 1165) was 30 or 40 yards.

I don't know and I can not tell how much the salt grass would be in a vertical distance above the high-water line.

Mr. Liljeqvist. Q. Take around the meander line, where was the salt grass line?

A. Well, there was a lot of salt grass on this meander line; that is the only point I know where the meander line touched practically. (R. 1165.)

I think there was a lot of salt grass along there on a line that runs east and west, on this meander line, there was a ridge along there.

I do not know whether the high-water mark of the lake did not come up to the Neal meander line around the north part of the lake; it might have come close to it; probably did; I don't know. (R. 1166.)

Mr. JAMES HENRY GIBSON, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

My south line is along the (Neal) meander line. (R. 1175.)

Mr. LILJEQVIST. Q. And how deep does the water get ordinarily when the lake (R. 1175) backs up at the meander line on the claim you are holding down.

A. Well, I do not know just how far it has been backed up; right along this meander line is where I built, and there is a ridge that runs down that, and it stops at that ridge mostly.

The ridge is north of my house and the water generally stops there. The water is pretty close there to the edge of that ridge beyond the house.

Mr. LILJEQVIST. Q. Right back of that house on the meander line, it is a little bit lower?

A. Yes, a little bit lower. (R. 1176.)

Mr. MARCELLUS B. HAYES, called as a witness for the plaintiff, testified in substance as follows:

I did not happen to be right down there at the time Mr. Neal made his meander line survey, but I have been there before, and I have been there since, but I was not there when he was surveying.

Mr. BLACKMAR. Q. Now, in that township where he cut his survey off, was there any difference in the character of the land north of his line and south of his line?

A. Well, we owned land right on the meander line, and in haying time we mowed right across the meander line. We cut hay on both sides of the (Neal) meander line. And you could not tell until after the stakes were put in there, you could not tell to (R. 1197) where the other line was. You can now, of course, but until then you did not know where it was at.

Q. As I understand it, when you start out there with your mowing machine and start to cut your hay you cannot tell the place where you cross the (Neal) meander line?

A. No. (R. 1198.)

I am familiar with the east and west fence line on the north side of the George Thompson place referred to by Mr. Bunyard in his testimony. (R. 1206.)

The year that Thompson, Vickers, Joe Clark, and Peterson owned that property, the old Thompson line from our northeast corner ran right on due east of the Showen place, or what used to be the Bob Arbor place and the (Neal) meander line from the northeast corner of that land directly north of the Peterson place; my nephew, George Hill, deeded that land; on the Showen place there are only six or seven acres of deeded or patented land, the rest is also inside (R. 1207) the meander line, and from the southwest corner of the northeast corner of the Hill place, the Neal meander line angles around that. There is about 97 acres of patented land on the George Hill place. It is between one-eighth and one-fourth of a

mile from the northeast corner of our place to the (Neal) meander line. At the northeast corner of the Peterson place and the George Thompson place, and take it on the George Hill place, it extends or goes there almost half a mile.

Mr. BLACKMAR. Q. So that this fence he referred to in some places was fully a half mile from the Neal meander line?

A: The northeast corner would be. It cannot be quite a half mile, but right close to a half mile.

Q. In all your experience with the lake, have you ever seen any place on this lake where you could identify the Neal meander line with the vegetation?

A. Without these poles? (R. 1207.)

Q. Yes.

A. No, sir; no one could unless he was a surveyor. (R. 1208.)

Cross-examination:

Mr. LILJEQVIST. Q. Well, was it wetter down below the (Neal) meander, more tules and things of that kind?

A. We have gone out of that ranch. We finally purchased that land in later years. You could follow out to the lake if (R. 1214) you went out far. I think the last few years, some years closer, and some years farther out. There was alwa[redacted] lake there.

Q. Mr. Hayes, at this place in these subsequent years after 1906, in the springtime, when the lake backed up and filled up, did the water come to the Neal line where you have your deeded land?

A. From the lake? (R. 1215.)

Q. Yes.

A. I think there were years that it did come up to the (Neal) meander line. Anybody knows in this lake there is no two years alike. Some years that run-off of the waters is lots larger than others.

Q. I know. How far did it go in the extreme years after 1906 below the (Neal) meander line at the high-water mark?

A. How far would the water recede back from the (Neal) meander line?

Q. At the high-water mark. At the high-water period in the lake at any time after 1906 until the last couple of years.

A. In our field there always was around 500 acres of land.

Q. In your surveyed field?

A. In the field, the land inside of our enclosure, there is 170 odd acres of deeded land, patented land, and the rest is land we had in our possession there, and ordinarily we cut all that field. There have been a few years right in the center of the ranch like there is a low country in there, and (R. 1215) some years we could not cut that out, and it never afforded much hay anyhow, but ordinarily back on the south part and north part we cut the biggest part and pasture it.

The part that we got a crop on, in the springtime it was irrigated from the lake and from the Silvies River both. Water came from

the Silvies River and came down to the east side of the range and place there.

Mr. LILJEQVIST. Q. That land in there really has to be flooded to give you any real hay crop, doesn't it? (R. 1216.)

A. Yes; not necessarily from the lake at all, but any.

Q. Any water at all?

A. Yes.

The nature of the soil is such that you do not get much of a crop from subirrigation. You have to get flood waters either from the river or from the lake. Prior to the last three years, we have always cut some, or more or less wild hay there. The last stack of wild hay we cut there was about three years ago. (R. 1216.)

Mr. LILJEQVIST. Q. What caused that hay to grow? What waters? That is what I want to try and get.

A. You take it on the extreme south, the land laid along the lake there, and, of course, that low country, it would naturally come up there in the spring of the year and recede and go back. Take it on the north, the most northerly from the range, and the water from the Silvies River would come out there and irrigate it, but the water would overflow; the water from the river would go all over the land.

The water did not come to the normal level on the north part of the ranch. I referred to the deeded or patented land. With reference to the (Neal) meander line between my patented land and the unsurveyed part, I have seen the water close to the (Neal) meander line at different times; there must have been times it was over the meander line, but sometimes it would be out there quite a ways from it. (R. 1217–1218.)

Mr. LILJEQVIST. Q. Have you ever claimed any water rights on this patented lands there by reason of the backwater of the lake?

A. No, sir.

Mr. BLACKMAR. I don't know whether in this case it is right (R. 1219) to attempt to commit these witnesses as to any water rights. I assume if any of these gentlemen have any water rights down there that they will want to assert them sometime——

SPECIAL MASTER. They will have to see lawyers about that. It might be perfectly legitimate for Mr. Liljeqvist to ask the witness if he ever made a claim. If he has made a claim to the back waters of the lake that would indicate that the backing up of the water from the lake did him some good.

Mr. BLACKMAR. I merely wanted to suggest that I would not want any witness, by reason of anything that he says here, to lose any right.

Mr. LILJEQVIST. I want the facts, and if the witness does not claim any water rights by reason of the backing up of the lake, I want to know it.

SPECIAL MASTER. Yes; he might say he didn't claim, or he might say that he did claim, or he might say that he did not know whether

he would claim or not, and he would have to see a lawyer before he would answer that question. But if he has a state of mind that he makes no claim, you are entitled to know, or, on the other hand, if he does make a claim or has (R. 1219) made a claim, that is in line with your cross-examination, and the question is, if you ever made a claim in respect to any of this property to water rights resulting from the backing up of the waters of the lake?

A. I haven't; no, sir.

SPECIAL MASTER. And have you in mind now that you have or may have rights resulting from that backing of the lake, or that you may or will in the future make such a claim? (R. 1220.)

A. Well, if I was going to be deprived of my water, I would certainly put in a claim for it.

SPECIAL MASTER. Yes.

Mr. LILJEQVIST. Let me put it this way: In this whole country there has been a fight on for water for years, hasn't there?

A. Yes.

Q. Now, are you claiming any beneficial use on this unsurveyed land by the backing up of the water of the lake?

A. Well, we have never—we have never gone to court. On the adjudication of the water we make no claim.

Q. There has never been adjudication with reference to the unsurveyed meander line inside of Malheur Lake.

A. If they were going to adjudicate the water of Malheur Lake and we continued to own this land, I imagine we will be there scrapping for this water; I imagine.

The (Neal) meander line is north of the Thompson place, a little west. (R. 1220.) The Thompson land is right close to the (Silvies) river. The river runs close to the Showen house, and approximately at the Showen house the river forks out and the water goes in all directions.

At the Thompson place at extreme high water the water would back up there I should imagine from the lake up the river and spread out, but the water comes from the river there too. Feeding usually is done there sometime in the latter part of March or April, and it is very seldom that you are there to watch this water, just exactly how it overflows and where it comes from. I would not undertake to say that the water of the lake backs up on to that seven acres (R. 1221) at the Showen place or right to the edge of it. It is right on the (Silvies) river. There is a channel that runs from the Showen place down into the lake, and I am sure the water of the lake backed up into that channel to the Showen place. (R. 1221.)

Mr. LILJEQVIST. Q. Are you attempting to tell us that the ordinary high water of the normal years did not come to the Neal meander line along the north side of that lake?

A. Now, Mr. Liljeqvist, that would be a hard question to answer. What would be a normal year with all this water? I have seen

water come up to the meander line and come across the meander line, but ordinarily this meander line—I have seen the water around that line, I believe, oftener than any other place, and other years I have seen it away out from the line.

Q. In the dry part of the year?

A. No; during the haying season. The way we handle this lake ranch down there, we usually go down in haying time and get the hay and stack it, and we are not there until feeding time, and time to turn in the cattle, and we go down and turn (R. 1225) in the cattle, and when it comes time to feed the hay out, we put a man there and feed out the hay, and in the latter part of March or first of April we take him out, and he is not there maybe any more until haying time.

The reason I am not in there is because you have to protect your stock, and get it off there during the season the hay is gone. In our experience, there were not many years the farmers could not get hay below the (Neal) meander line.

I have seen hay cut on the Charlie Peterson place; they usually hay (R. 1226) right alongside of me, right at the same time; when we would be haying, also they would be haying. (R. 1226.)

Mr. LILJEQVIST. Q. Is there along the lands you are alongside, the unsurveyed land, above the meander line, is there any approximate line of salt grass along that meander line there? (R. 1228.)

A. Along around the edge of these knolls, that is the principal grass that grows around the knolls, if there is not too much greasewood right upon the knolls.

Q. Take your own land you are interested in, or claim, or squatted on, where with reference to the meander line of the Neal was the salt-water grass line?

A. On our particular place it will run from 200 to 300 feet back to almost a quarter of a mile, I guess.

Q. On your lands?

A. Yes; maybe not a quarter of a mile; I would not say that far.

I do not know where the salt grass line is north of the Grant Thompson place. I have been around and seen the meander stakes, but I do not remember where they were.

Mr. LILJEQVIST. Q. What is the fact about the salt-water line being vegetation that separates the high-water mark of the lake from the upland, in your experience?

A. It would not be applicable to our ranch. Take the meander line, it runs through our place and runs north (R. 1229) and east, and it runs through the middle of the mud, where the best sugar grows. Take it back north and northwest of that and there is a knoll that comes along, and you go to the edge of the knoll and you find salt grass growing.

Q. In front of that place when Neal cut his line he ran across a projection of damper land? (R. 1229.)

A. It is out where the sugar grass grows.

Q. A little water went in northerly of the Neal meander line on your place and the salt grass is a little farther up?

A. It is not unusual to see water there; it would come from the Herman Ruh place and always came across the line. (R. 1230.)

Q. Along that place, from your recollection of it, what is the fact about that meander line cutting across little projections of wet land and a little projection of where there might be salt grass on it?

A. It is not all on the same elevation, I would not think. I think there is depression along there.

I was not there when the line was surveyed.

Q. You did not apply to the Government to have it resurveyed along your line?

A. No.

Q. No settler in all these years ever applied to have a corrected survey ran along the Neal line that you know of?

A. I haven't any knowledge of anything like that.

Mr. LILJEQVIST. Q. Did you belong to this riparian owners' association?

A. A number of years ago there was a man that came in here from outside, and he was going to get a deed of this land to the center of the lake. I signed up with that man. A man named McKinley.

Q. If you signed it he said he would bring a title for the settler to the center of the lake, and he would take half and the settler take half?

A. Yes.

We never got anywhere with that; quite a few people signed up with him and I happened to be one. We did not belong to any riparian owners' association.

Mr. LILJEQVIST. Q. There has been a lot of controversy all these years between the riparian owners and the people who have settled in that lake?

A. Yes.

Q. The people up above you claim they were on the lake and owned to the center of the lake?

A. Yes.

Q. And the other people among you, you being one of them, got onto these high places and fenced in, and stood pat all these years?

A. That was our position.

Q. There have been a number of lawsuits in this country as to whether the upland man owned it, or the fellow that stayed on there for ten years owned it?

A. We always felt sometime this land would be straightened, either through the State or United States, and we had (R. 1231) peaceful possession of this land and had it fenced, and used it and operated it, and we were always willing to wait until there was a final decision, and thought if the rest went to (R. 1231) the center of the lake we would, too; that was our idea about it. (R. 1232.)

Redirect examination:

Mr. BLACKMAR. Q. Mr. Hayes, there is a good deal of salt grass out there that extends a considerable distance below the meander line in places?

A. Yes; take it on the meander line and take it out in the south part of our place and there is a ridge that runs through there, anywhere from 30 to 40 acres, pretty much salt grass.

Q. Whether or not it is salt grass there depends somewhat on the character of the soil and the water?

A. Well, salt grass ordinarily—where you see salt grass growing, it is usually worthless soil. I would say it is no-account soil. You never see salt grass growing—it is a very rare thing—on good land.

On good dry land out in the lake there is nothing in the way of grass. Dry land is nothing in Harney County. You want something watered.

Mr. BLACKMAR. Q. Here is what I have in mind: Suppose that you and I (R. 1232) have adjoining fields, and I had good soil on mine and that you have poor soil on yours, and have (R. 1233) salt grass, what will I get on my ground?

A. If you had a decent (water) year and cultivated it right, you stood a show for a good crop.

Salt grass grows on a kind of alkali ground. In that low country in a corresponding field that has better soil and the same amount of water, the grass that will naturally grow on that will be sugar grass. That is the principal grass in the low country. That is where they get the big hay yield from sugar grass. There is wire grass and another grass, but sugar grass is the prevailing grass. The salt grass that I have referred to indicates poor soil, and there is no indication of water about salt grass. Very often you see salt grass if it doesn't get too much water, and I have cut it and you get fairly good hay. There are lots of seed to it, but ordinarily it is better for pasture. (R. 1233.)

Recross-examination:

Mr. LILJEQVIST. Q. Mr. Hayes, is it not a fact that salt grass springs up on the borders of places where the water has been, and has deposited alkali, and then the water receded?

A. Well, salt grass is the poorest soil—I would not undertake to say—you will find it around the borders of all these lakes. Take at the east end of the lake, and pretty much all the grass around the east end of the lake is salt grass, anywhere near the lake. (R. 1238.)

Mrs. MARCELLUS B. HAYES, called as a witness for the plaintiff, testified in substance as follows:

I did not know where the Neal meander line was until they put up these Bird (Refuge) notices. Until that time I knew there was a meander line there, but I did not know where it was, and I did not care.

Mr. BLACKMAR. Q. Having since that time located the line by means of these Bird Refuge posts, can you tell me whether or not there is any difference in the vegetation immediately above those posts and immediately below?

A. Well, I would say that there is not. We put up hay above and below. Really we get more of our hay below the meander line. (R. 1242.)

Mr. EDWARD ANDERSON, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

I cut hay about a quarter of a mile in front of the Charlie Reed place in 1893. Afterwards I learned about where the meander line was on that place. At the particular time I cut the hay on his place, the early part there, we did not cut much farther than about a quarter—just around in little places we cut, knolls and like that (R. 1287), at first around his house, when we first settled in there. Then as years went by we kept cutting in farther (north of Charles Reed's house) all the time.

I never went in a boat in front of the Reed place.

I think I know now where the Neal meander line is in front of the Reed place. In those days in the springtime the water came up to that meander line. (R. 1288.)

Mr. FAY COMEGYS, called as a witness for the plaintiff, testified in substance as follows:

I know where the Neal line is with reference to the house which we lived in on the Hill Brothers place. (R. 1423.) It is on the north line. The Hughet place (where the Hill Brothers now live) was half a mile square, and it was right on the north line. It is three-quarters of a mile between there and the old meander line and the new meander line; quarter of a mile from Alva Springer's place, and quarter of a mile over the Hughet place.

During the time that my family lived down there, I did not cut any hay below the Neal meander line. Judge Hughet did, though. He cut hay probably half a mile out (north) from the Neal meander line along in 1893, 1894, or 1895. (R. 1424.)

I do not know whether there were any houses below the Neal meander line when I went in there on the south side of Malheur Lake to live, in 1893, 1894, or 1895. I do not know exactly the course of the Neal meander line after it reached the Dunn place. There may have been a cabin or two (in there). I have been along there lots, but I do not know exactly where that line ran after it got over to the Dunn place. The Bennett place is on the north side.

Mr. BLACKMAR. Q. At any rate, when you first came into the country down there, there were a large number of settlers who had houses within the Neal meander line?

A. Yes.

Q. Quite a number. And those people cut hay in there, didn't they?

A. Yes. (R. 1428.)

Q. And stacked it inside the meander line?

A. Yes.

Q. And fed it to their cattle inside the meander line?

A. Yes, sir.

Q. And continued to live in there all the time that you have been familiar with that place?

A. Well, they came in there in July and put their hay up, and they would feed their stock, and in the spring, they would move out. They would take their stock out in the spring of the year, most every year in the early days; it was pretty wet from 1895 to 1900; the water was pretty high. (R. 1428.)

When the water would recede they would return to their homes. (R. 1428–1429.)

Cross-examination:

I know where the Neal meander line was on the Hughet place.

Mr. LILJEQVIST. Q. In the ordinary spring time did the lake back to that line?

A. Yes. (R. 1437.)

Redirect examination:

Mr. BLACKMAR. Q. You did not mean to say, in answer to Mr. Liljeqvist's questions, that this water backs up to the Neal meander line, and stops there? (R. 1441.)

A. Why, it runs—it never runs down to the lake; it spreads out; some years the lake is high, and it backs her up; I have seen water clear on the old meander line, the Meldrum line, on the Springer and Dunn places.

Q. There is not anything about the Neal meander line that stops (R. 1442) the water there, is there?

A. No.

Q. Some years it comes up to that line, and some years it goes above?

A. Yes; and below.

Q. Can you walk out there on that place of yours, or where you were, and around in that vicinity, and by the change of the vegetation, identify where the Neal meander line is?

A. I could not do it on account of the fence.

Q. Assume that there is no fence there: Could you walk out there and locate this line in any change of the vegetation?

A. No.

Recross-examination:

Mr. LILJEQVIST. Q. There is no salt-grass line there, because the flood waters of the Blitzen flooded the surveyed lands above the Neal line, is that correct? (R. 1442.)

A. There is no salt grass in there where I lived then.

Q. And the reason it is not there is because every spring the Blitzen overflows the land?

A. Yes, the salt grass is around toward Windy Point and lake shore—on the lake.

Q. Places where the lake did not back up over it, or went over it just a little bit and receded, that is where the salt grass sprang up around that lake?

A. Yes.

Q. Wasn't that salt grass in the early days a pretty good indication of where the line of the lake was?

A. Yes.

Q. And, of course, the rule of the salt grass did not prove true in the overflow country of the Silvies, and did not prove true in the overflow country of the Blitzen?

A. No.

Q. Because of the fact those rivers did overflow and the salt grass could not grow around the edges of the lake in those places?

A. It could not grow where the water went over it, because it would scald it out.

Mr. SIDNEY COMEGYS, called as a witness for the plaintiff, testified in substance as follows:

During the thirty years that I have been familiar with Malheur Lake, I have seen the water above the Neal meander line, and I have seen it below it. Especially where I live. I do not know much about the meander (R. 1451) line outside of right along in there; that ranch I own and where we first lived; did not know much about it; did not see the Neal meander line.

Mr. BLACKMAR. Q. In other words, the point to which it would come every year was not a fixed point by any means, was it?

A. No; I did not know much about the survey outside of just where it went, only just north of my holdings there.

Cross-examination:

Mr. Dunn bought my place from me.

Mr. LILJEQVIST. Q. Now, that Neal line is about a quarter of a mile out on the eastern side of your land, isn't it, and about a quarter of a mile out on the western side of your land? It comes in in a sort of an angle close to your surveyed land in the center?

A. No; I believe it was on the north side. Mr. Dunn has more land adjoining the place I sold him. He owned some land. He had more land there.

He (Dunn) owned land west of me at the time I sold this ranch to him. (R. 1452.) I had 160 acres there, and it was surveyed by the Neal survey. It was not fractional. (R. 1453.) The ranch Billy Dunn owned west of me was fractional.

Frank Cawlfield owned the land immediately to the north between my land and the meander line. Frank Cawlfield sold it to D. H. (Rye) Smyth. The land immediately north of my place was the land that Cawlfield had the lawsuit about with D. H. (Rye) Smyth.

Mr. LILJEQVIST. Q. And in that particular lawsuit Cawlfield's contention was that the line was correctly run, and whatever land had become uncovered was due to the recession of the water?

A. I don't know.

Q. Do you attempt to state in this record that the Neal line was not established at the average or mean high-water line around the Cawlfield north edge?

A. I don't know. I could not answer that question. I knew he run a line there, but I don't know whether it was to establish the water line or not.

Q. Now, let me put the question in this way: In the average high water in the springtime during the years, taking it during the time that you knew it, did the water of the lake back up to the Cawlfield north line?

A. Well, I don't know what you would call an average time of the water there, because maybe one year you would have high water, and maybe the next year it would be lower, don't you see? I don't know what you would call high water.

I owned this place I believe from 1907 to 1912, something like that. I knew something about that place in 1884; we lived on this place before I moved there. (R. 1454.) I did not live on that place immediately south of Cawlfield's land in 1884. (R. 1454–1455.)

I had lived two or three different places before I bought the Caldwell ranch, or what was known as the Caldwell ranch at that time (also known as the Comegys place, the Sims place, and at the present time, the Jim Bunyard place. R. 1455). I lived two or three different places before I came there.

In 1884 we lived there on this place we moved to (known as the Caldwell place, or the Comegys place, or Sims place, or the Bunyard place). It has been called a good many names; it has been called the Comegys place, the Sims place and, I believe, the Jim Bunyard place now.

Mr. LILJEQVIST. Q. That is the patented land of Jim Bunyard, or surveyed land of Jim Bunyard?

A. I guess it is partly patented, or maybe all of it. I don't know how the lines do go through there.

It is north of the Springer place, the present Springer ranch, where Alva Springer now lives (the Caldwell, or the Comegys, or the Sims, or the Jim Bunyard place).

Mr. LILJEQVIST. Q. That is owned by the Hill Brothers now? (R. 1455.)

A. Yes; I understand so.

I do not know how far the Neal meander line is from the Alva Springer line. I am not familiar with the Neal (meander) line there. I am familiar with the Neal (meander) line below the Caldwell ranch and west a little.

The Caldwell ranch is the Billy Dunn ranch now; west of the Billy Dunn ranch; the Billy Dunn ranch joins the Springer (R.

1456) ranch; the place that I owned was immediately west of Springer's place; it is now called the Billy Dunn place; that is the place that I bought.

I think that place (the Billy Dunn place) is half a mile from the meander line, the north line.

I am pretty well familiar with the meander line a half mile north of that place and subsequently secured by William J. Dunn. It runs kind of (R. 1456) an oblong shape to what is known as the Charlie Reed place; it goes through part of the Charlie Reed place.

Mr. LILJEQVIST. Q. It goes in a southwesterly direction and in a northwesterly direction through the north end of the Reed place, according to the map. (Plaintiff's Exhibit No. 3.)

A. Yes, something like that.

Q. At that bend or angle of the meander, that is where the Cawlfield land was?

A. Yes; Frank Cawlfield lived right in there.

The water was above the Neal meander line there in 1894. I know in the late nineties we had lots of water there and especially in 1897. I remember that distinctly. (R. 1457.)

Mr. LILJEQVIST. Q. At any rate, between the time you went in there, and the latter part of the nineties, a number of years you know that the water did go up to the Neal line at least?

A. Oh, yes; it went above the line.

Q. Can you tell any year between that period it did not go to the Neal line?

A. I don't know as I could tell—name any certain year in the nineties, but I could name one year it went above. (R. 1457.)

Q. I am not talking about the fall, but I am talking about ordinary high water in this case. The witness has a lot of trouble above the recession of the water. The Government instructed Neal to run that line at mean high water, and that is what I am talking about these three weeks. Where is the mean high water in your recollection?

A. My recollection is——

Mr. BLACKMAR. Excuse me. Just a moment. Before you answer that question I would like to know what you say when you are going to answer a question about the mean high-water mark. It would not mean anything to me if you said it came to the mean high-water mark, if I didn't know what you meant by the mean high-water mark.

A. Well, they had several high waters there in the nineties. If I remember right, when Neal ran that survey through there it was late in the year, and the water had receded back.

Mr. LILJEQVIST. Yes; that is correct.

A. In the spring.

I could not say whether the water came back to the Neal meander line immediately following the year in which Mr. Neal made the survey. It came back a little later; it came back in 1897. At least, I know it did in 1897, but I could not say as to the spring of 1896.

Mr. LILJEQVIST. Q. And in '94 you are sure it was there then, aren't you? (R. 1458.)

A. Yes, there was lots of water.

Q. And in '98 was it there?

A. Well, they had—yes, they had quite a bit of water in '98.

Q. In '99 was it there?

A. It kept getting a little less all the time; they kept cutting more hay; the water kept receding back a little farther after '97. (R. 1459.)

Mr. D. H. SMYTH, Junior, called as a witness for the plaintiff, testified in substance as follows:

I do not know much about the Neal meander line (down on the D. H. (Rye) Smyth place); I knew about where it was, that is about all.

Mr. BLACKMAR. Q. There is not anything in the vegetation down there that would indicate where the line was, is there?

A. Not that I ever noticed.

Q. The fact of the matter is those ranchers down there have just cut hay right over the meander line, and can not tell where it is? (R. 1465.)

A. I guess they do. I know the meander line runs through there some place, but I don't know just where it went through.

Cross-examination:

Mr. LILJEQVIST. Q. Now, the reason there is not any difference in the vegetation along your father's property that is patented and the unsurveyed land immediately below is because, is it not, the Blitzen overflow waters run across those lands and right square into the area below the meander?

A. In high water I think the Blitzen overflows there, yes.

Q. And in ordinary seasons the Blitzen overflowed every year down there, didn't it?

A. Yes, I think it did. (R. 1467.)

Mr. ORIN EUGENE THOMPSON, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

Mr. LILJEQVIST. Q. Isn't it a fact the salt grass grew at the upper edge of the lake beyond the water line?

A. It generally grows along the water line, yes. (R. 1514.)

Q. Isn't the salt grass more or less a distinguishing class of vegetation showing the high-water mark on that lake?

A. Well, it seems to be the salt grass all the way around the lake, as far as I ever have been.

Q. If there isn't any salt grass in the area of an overflow from the Blitzen and Silvies, it is because the flood waters do not permit the salt grass to grow there, is that correct?

A. I think so. (R. 1515.)

Mr. COREY E. SMYTH, called as a witness for the plaintiff, testified in substance as follows:

I know where the Neal meander line is supposed to be right in there (by my father's place). I do not know where the posts are marking the Bird Reserve.

When I was working down there on my father's place, I knew the approximate location of the Neal meander line by his place.

Mr. BLACKMAR. Q. Now, was there anything above or below the meander line in the way of grass or other vegetation that would permit you to distinguish where the line was?

A. No; only by the fence.

A stranger coming in there could not tell where the (Neal) meander line was from the vegetation. There was not any bank in there of any kind. (R. 1526.)

Cross-examination:

Mr. LILJEQVIST. Q. Your father has claimed riparian rights for years and years on the Cawlfield land, hasn't he?

A. Yes.

Q. Well, has your father claimed for years in your family that that Neal line there was the correct line?

A. It is supposed to be, I guess.

Q. Are you saying now that it is not the correct line?

A. No, sir; I ain't. (R. 1528.)

Mr. ARCHIE MCGOWAN, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. From the springtime in those years, how far did the water of the lake get down (below) the Neal meander line, do you know, to the fall of the year? (R. 1567.)

A. That varied greatly. There was a great variation there.

Q. Isn't it a fact that the waters of the lake would back up past the Neal meander line, or up to it?

A. Now, the Neal line? That is the last survey?

Mr. LILJEQVIST. Yes.

SPECIAL MASTER. Yes.

A. That is going back a good many years ago. That was the condition as I had observed it.

Mr. LILJEQVIST. Q. Isn't it a fact, below that (Neal meander) line you got a lot more tules, and a lot more of that nature of vegetation, as distinguished from above the line?

A. Well, there was more of it, yes, but I have seen it—if this is information you want—I have seen lots of tules growing above the line; quite a lot of them; lots of them.

Q. And, in fact, tules grow from Lawen down to the lake on each side of the Silvies? (R. 1568.)

A. I have seen tules growing clear to Burns.

Q. Isn't it a fact that the tules became a great deal higher and taller when you got down to the Neal line?

A. Well, there were larger areas of tules beyond the meander line; yes. (R. 1569.)

Q. From the time you knew it, isn't it a fact that above the meander line people had been cultivating the thing, and it was being trained into meadow grasses?

A. Well, yes; there has been some haying operations. I don't say much cultivation, though, until only recently.

Q. They were cutting and mowing it down?

A. Yes. (R. 1569.)

Mr. WILLIAM DAVID HUFFMAN, called as a witness for the plaintiff, testified in substance as follows:

Yesterday for the first time, I saw the posts down there in Malheur Lake that mark the Bird Reservation. I have seen the posts before, but I didn't know what they were. They were just little stakes; there were no signs upon them, but I was down there yesterday with a man who knew where the (Neal meander) line was, and I asked him where it was, and he undertook to show me where it was. (R. 1577.)

Cross-examination.

Mr. LILJEQVIST. Q. Now, as I understand, you don't know a thing about where the water comes when the lake backs up with reference to the Neal meander line?

A. Well, I know where it comes in places. I don't know all the way around. And that varies from year to year. (R. 1584.)

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, testified in substance as follows:

In 1895 I saw Mr. Neal make that (meander line) survey. When I first saw Mr. Neal he was working at the Reinemann place on the south side (of Malheur Lake); right in there north of the Reinemann house, right in there some place, and afterwards I saw him up farther east. I saw him two or three times when he was making that survey. (R. 1651.) I do not remember just where he did run that line through the Reinemann place, but he was working in there when I first saw him working. I would not say just where he ran that line (on the) Reinemann (place); it was north of the Reinemann house, though. The Reinemann house was south of where he was working. He was north of the house, and I remember I was south of where he was working.

Mr. BLACKMAR. Q. The particular place on the Reinemann homestead where you saw him working, was there anything in the vegetation up there which seemed to mark a change which would indicate which was dry land and which was lake land?

A. Well, there is a place which ran out, tules and other places, between the sloughs, that came up; where there was tules there would

be salt grass and one thing or another. It was hard to tell where the meander line should have been, it seemed to me. It was a pretty hard proposition to tell just where it should have been run.

Q. On this Reinemann property was there any lake bank there?

A. No, no lake there when he was running it when I saw him. There has been. The water has been up high there on the Reinemann (R. 1652) place.

Q. I assume during the period you have been in this country you have seen water years when it would be up on the Reinemann place, and other years when it would not reach it?

A. Yes, sir; that is the fact.

Q. But on the Reinemann place you saw no bank in there of (R. 1652) any kind?

A. No lake bank; no, sir.

It was just a gradual slope.

I do not remember that (Neal meander line) being run through sagebrush fields. I know there is a place up farther east they cut across a sagebrush point. I think it was up toward a place where Dick Haines had a ranch in there afterwards; but I think mostly the greasewood was outside (of the meander line).

At that place I have just referred to, I think there was greasewood below the line and greasewood above; not much greasewood below the line. I think Mr. Neal was pretty careful getting around on that low land, as far as he could.

At that particular place (referred to) there was greasewood above and below the line. There was a good deal of kicking at that time among the settlers; they seemed to be (R. 1653) dissatisfied; they had some kind of a meeting one time; I was not there, but I was down in that country when they had the meeting.

Mr. LILJEQVIST. I object, as that would be hearsay. (R. 1654.)

Cross-examination:

I do not think that the meander line established by Mr. Neal (R. 1661) was approximately at the ordinary high water of the (Malheur) lake. It is pretty hard to tell now where that line should have been. I have seen the water above it and below it. I think Mr. Neal was doing the best he could.

In the springtime the water went above it; in the fall of the year it went way below it; I think it would go farther below it than it would go above it in the ordinary year. (R. 1661.)

Mr. A. A. REINEMANN, called as a witness for the plaintiff, testified in substance as follows:

The Neal meander line runs on our north forty (acres); the northeast forty is on the meander line. There is a triangle piece in there. That is the reason that place is a fraction.

(NOTE.—The Reinemann house is in the southeast quarter of the southwest quarter of section 29, T. 26 S., R. 31 E., south of the lake.

The meander line touches the place at the (R. 1665) northeast corner of the southwest quarter of the northeast quarter of section 29, T. 26 S., R. 31 E., south of the lake. Pecore, R. 1666.)

Mr. BLACKMAR. Now, directing your attention to that meander line on your place, tell me whether or not there is any difference in the character of the land north of the meander line and south of the meander line.

A. I never discovered any.

Q. Is there any difference in the character of the vegetation that grows there?

A. No; there is not any.

Q. So that in your hay operations, when you cut down below the meander line there wasn't anything in the difference of the hay there that would point to you where the meander line was?

A. No. (R. 1666.)

Q. Did your father ever point out to you a place on that Neal meander line where there was sagebrush above and below the meander line?

A. On the original one, the first one they had through (R. 1670) there.

Q. Not on the Neal line?

A. No; I don't remember about the Neal.

Q. That was on that line of 1877?

A. Yes. (R. 1670.)

Mr. JOHN J. HEINZ, called as a witness for the plaintiff, testified in substance as follows:

I know where the Neal meander line is. During the time I lived on this place (John J. Heinz place), I have cut hay both above and below the Neal meander line, except one year, when we had to move out on account of the high water; I am not sure whether it was 1897 or 1898, and we could not cut any.

Mr. BLACKMAR. Q. On your place where this Neal meander line was run, was there any difference in the character of the grass or other vegetation above the line and below the line, or was it practically the same?

A. Well, in places the tules were a little bigger, they (R. 1680) had not been cut down, and he seemed to cut around the tules; he didn't go through the tules; and in other places the grass was cut on either side; there was no difference.

When Mr. Neal came through there, and ran his line in the fall, I was not home, but I was right there in the neighborhood working on a schoolhouse. I knew where the line was that fall.

Mr. BLACKMAR. Q. Now, that year that he came through there with that line, did you cut hay both above and below the meander line?

A. Yes, it was already cut above and below.

It was stacked up; I had two or three; two I know of, stacks of hay below the (Neal) meander line. One of the stacks of hay was about 300 yards, not quite a quarter, and the other one probably 200 yards, below the (Neal) meander line. (R. 1681.)

Mr. BLACKMAR. Q. And in that year did you have neighbors who lived near you who were cutting hay below the meander line?

A. Well, I think there was. I think that the Hill boys, George Hill, cut some below the meander, and I think that the Showen place cut below the meander, and then north of me was Haley (R. 1681), Scott Haley, and he cut below the meander line. (R. 1682.)

Mr. GEORGE MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

I was living on my property at the time Mr. Neal ran his meander line through it; I carried the flagpole until he surveyed out my ranch.

There was no difference between the vegetation on the north side and on the south side of the line that Mr. Neal ran there across my place; the vegetation consisted mostly of salt grass; there was salt grass both above and below that line. (R. 1689.)

(NOTE.—The George Marshall place is located in lots 9 and 10, the west half of the northwest quarter and the southeast quarter of the northwest quarter, section 36, T. 26 S., R. 31 E., south of the lake. That was the land that was patented to him. Pecore. R. 1689.)

I think Mr. Neal came through my place in the fall.

I always cut hay on my own place; I cut hay below the (Neal) meander line, and stacked it there, and when Mr. Neal came through I had haystacks on both sides of that meander line; I had it stacked at my place, and inside of that (Neal) meander line; I had hay on both sides after it was surveyed. (R. 1690.)

I remember carrying the flagpole for Mr. Neal; I remember doing that on horseback. I was on horseback because I didn't want to wade through the mud. I rode the horse and let him wade it.

Mr. BLACKMAR. Q. Was that through the salt-grass part or through the tules?

A. Yes; salt grass very little ways; patches; it wasn't all salt grass. It was some tules and then some other kinds of grass. (R. 1691.)

Cross-examination:

I carried the flagpole to survey the east line, and the north line, and the west line of my place. I rode horseback, and it was muddy part of the time. I was ahead of the chain carriers, and they followed me.

Mr. LILJEQVIST. Q. How did you pick out the place where you went with your horse?

A. I followed as close to the spring branch as I could get; the spring branch was on the east of me, and I was going north, and I rode as close to that as I could get without miring down.

The spring branch was to the east of me (R. 1696); it lay along the east, and I was going north; the spring branch went through my land a ways. The spring branch was east of part of my line.

The north line of my land was right near where Mr. Benson has a cabin now.

I do not know who owns the property now. I sold my land to Luft. I think Joe Kado owns the place now. (R. 1697.)

I went ahead on horseback; the chain men followed me (R. 1697), and Mr. Neal was standing back there with a compass.

Mr. LILJEQVIST. Q. Who picked out the place where you went?

A. I did.

Q. How did you pick out that place?

A. I just rode along where I wanted that line to go, and he surveyed there.

Q. You wanted it to go along the edge of the lake, didn't you?

A. No. (R. 1698.)

I wanted it (the line) to go right where it did go; right where it went, because I didn't want anything any farther north, for the further reason that I had all I wanted right there.

Mr. LILJEQVIST. Q. Did you have any other reason? You are the first man I ever saw that didn't want a lot of land.

A. I didn't want it all—never did.

Q. Did you have any other reason why you didn't go farther north?

A. No, that is reason enough.

Q. You didn't want to go out farther into the mud?

A. No, it wasn't muddy. I had all the land I needed, 160 acres is about all. (R. 1698.)

The grass extended probably a couple of hundred yards north of my line (on my place), then there were tules.

Mr. LILJEQVIST. Q. And you didn't take that grass in at all, then?

A. No.

Q. You didn't want it?

A. No. (R. 1700.)

Mr. RALPH CATTERSON, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Now, on this place (Ralph Catterson place) where you run the fence down into the Bird Reserve, is there any change of vegetation on there to a person who did not know where the Neal meander line was so (R. 1706) that they could walk down there and see where the line was?

A. No, sir; there was not.

There is no bank there that would point out the Neal meander line. It is very flat there, as close to the lake as it is. (R. 1707.)

Mr. BLACKMAR. Q. During the time that you have had this place (Ralph Catterson place), have you cut hay both above and below the Neal meander line?

A. Yes.

Q. Did you have salt grass both above and below the Neal meander line?

A. Yes, sir. (R. 1708.)

Mr. JAMES A. TURNER, called as a witness for the plaintiff, testified in substance as follows:

I owned the place (about a quarter of a mile south of the Ben Ausmus house) at the time Mr. Neal ran his survey line. (R. 1721.) I went down and built a house on it, took up the place as a squatter's right; the land was unsurveyed. (R. 1721–1722.)

Mr. Neal ran his line to the north of my house, probably a half a mile to the north of it. I know he missed my place. For a mile to the north of my place there was nothing there that indicated a lake bank. The land lying north of my place was level, and there was no bank at all. (R. 1722.)

At the time Mr. Neal was working there on his line, I saw him there, but I did not talk to him; I saw him driving stakes and moving across, surveying.

I did not see any places cut through the tules there along his (Neal meander) line. (R. 1722.)

The vegetation north and south of those stakes was about the same. Immediately north of my place on his (Neal) meander line, was salt grass. Where I took my place up it seemed to be kind of a raise that ran north and south and went back to the lake, and at that time there was some scattering salt grass that grew on it, and other kinds of grasses, the names of which I do not know, but other grasses grew on it, and I took my place where it bordered in those days on what we called the edge of the main lake.

Mr. BLACKMAR. Q. But you had plenty of salt grass on your place?

A. Yes; along on this piece of high ground that ran along in north and south there was some salt grass that grew on that. (R. 1723.)

At the time Mr. Neal was in there surveying (in 1895) I got to my place by coming down by Lawen and driving in there; came down the road and just drove on in there.

At the time Mr. Neal came through there my place was above water. (R. 1723.) There was a considerable area of ground between my place and Mr. Neal's line which was above water. (R. 1723–1724.) I would say that the water was a half a mile south of my house when Mr. Neal came through there (in 1895).

Some of the other settlers in there used the same road to come in that I did. The road was pretty well marked on the ground by tracks at that time.

Mr. BLACKMAR. Q. A stranger would not have any trouble following it, would he?

A. No.

There was considerable salt grass below the Neal meander line near my place. The salt grass laid north and northeast of my place. (R. 1724.) There was no salt grass south of my place, or west of it.

My experience with salt grass is that if the water gets up over the salt grass, and it does not cover it entirely, it makes it better, and it grows better, but if it covers up for two or three months, something like that, it would kill it. (R. 1725.).

Cross-examination:

The salt grass that I was talking about was (R. 1726) salt grass inside the Neal (meander) line, and there was salt grass on the north side of where he ran his line across there; that line was about a half a mile north of where my place was. (R. 1727.)

If the water came—if we had what we call a run-off in the spring, the snow melting and running in there, the water with reference to the Neal meander line in the springtime, would go around on the low places, and go in above the meander line.

I saw Mr. Neal running his line, but I never talked to him. There was no trouble with that line that I know of. (R. 1729.)

The water in the springtime came to the Neal (meander) line, and above it, too, but I don't know how far. I have seen it past the line. I will say it came probably a half a mile. In the fall when it dries up it would go below it. (R. 1731.)

I know Mr. Otley, but I don't know whether he was president of the Malheur Lake Riparian Owners Association.

Mr. LILJEQVIST. Q. I say he (Mr. Fred Otley, sr.) claimed to own out to the center of the lake because he was on the meander line where the water came, is that correct?

A. Yes.

Q. That was his contention for years, wasn't it, until he died?

A. It wasn't that way every year, no.

Q. Didn't the water substantially every year come along the meander line on the north?

A. No, not every year.

Q. What year didn't it come?

A. The lake varied. The lake would vary, and the depth of it—it would depend on how much snow we would get in the mountains, and how quick the snow would go off and the run-off would make the water. If we had a warm spell and the water went out quickly, it would come down and raise the lake, and in (R. 1732) some years it (R. 1733) would not do that.

Q. In the time you lived there, those five years you were there, you were there two years but familiar with it about five years?

A. No, I was there two years.

Q. Did you know any year it did not go to the meander line that you were there?

A. Not in those two years, no.

Q. What did you do after those two years?

A. Well, I left there; I moved out of there and I didn't go back. When the meander line was surveyed I didn't think I would ever get the land, and so I left.

Q. And so you are only talking—the testimony you have given is only about the two years you were there?

A. No; I was around that lake there for years. I had land rented up there, and I had hay, and I was for years around that lake

Q. Around the north side of the lake?

A. Yes. (R. 1733.)

I was on old man Jordan's place; I had it rented there for three or four years. That place was situated north of the meander line. I lived on the Spurlock place one year; that was deeded land, north of the meander line. I could not say just where the water came to with reference to the meander line immediately south of the Spurlock place. (R. 1734.)

Mr. GEORGE WASHINGTON SIMMONS, called as a witness for the plaintiff, testified in substance as follows:

I was living down there (Malheur Lake) at the time that Mr. Neal ran his meander line. With reference to my property it was run right through the northern part of the place.

My place is owned by Frank Dunn now.

The old Simmons house is about a mile right north of where Pete Caldwell now lives.

(NOTE.—The old T. Simmons house is in the northwest quarter of section 33, T. 26 S., R. 31 E., south of the lake. Peçore. R. 1749.)

I do not remember exactly where the water was when Neal ran his line through my property, but it was quite a ways north of where he ran that line. I don't remember the distance in feet or miles; I was a kid at that time, but I know it wasn't anywhere near the water where he ran the line. I know more about it from what I heard the folks say. (R. 1749.)

There was more or less discussion in our household at that time about the Neal line.

Mr. BLACKMAR. Q. And there was lots of agitation in that neighborhood down there?

A. Yes, sir.

Q. Now, on your property and north of you where the line went through, was there any difference in the vegetation?

A. No; it was practically all the same.

Q. What kind of vegetation did you have on your property, as you remember it?

A. Oh, it was a mixture of all kinds of grasses. Some flags and some tules. (R. 1750.)

I have seen the water above and below the Neal meander line.

Our family always cut hay (R. 1750) below the Neal meander line, and the hay above and below the line was practically the same kind of stuff. (R. 1750.)

Mr. ALVIN C. SPURLOCK, called as a witness for the plaintiff, testified in substance as follows:

There was no difference between the vegetation above or below the (Neal) meander line.

Mr. BLACKMAR. Q. So that a person walking along there, cutting hay in there, could not tell where the line was, could he?

A. No, sir; there is a kind of a back water that runs up there in there, that the meander line runs right along, and on each end of it; it is just the same. It runs across the low place.

It is a kind of a slough, but the lake has no bank there. (R. 1755.)

In any normal year the water from the lake will come up as far as the Neal meander line. Of course, the last few years it has been awfully dry.

Mr. BLACKMAR. Q. Now, in these years you speak of, sometimes does it go above the Neal meander line?

A. Oh, yes; yes it goes up—well, it is over a quarter of a mile above, pretty near high.

Q. Are you talking about water in the slough, or all over the place?

A. It just backs up in the sloughs, in the tules.

Q. So that even when it backs up in this slough, still there will be some land which is not covered with water?

A. Oh, yes; lots of land that ain't covered with water.

Q. You do not mean to say that your entire place was covered with water for a half mile up?

A. No. (R. 1756.)

Quite a number of years it (the water of the lake) has not (R. 1757) backed up to the sloughs.

Mr. BLACKMAR. Q. The fact of the matter is, it is not very certain about where the water will come in any one year?

A. No; it will vary. (R. 1757.)

Cross-examination:

My brother has a place (the Charles A. Spurlock homestead) on the (Neal) meander line.

Mr. LILJEQVIST. Q. And the water ordinarily came up onto his land in the spring, did it?

A. Yes; in the sloughs.

The water backed up in the sloughs; it run through his place. It was from the (Malheur) lake, and then the sloughs come out of the Silvies River. It floods from the Silvies River in the spring; the west prong of the Silvies River runs through his place, and in high water it backs up from the (Malheur) lake, when it is an average year.

Mr. LILJEQVIST. Q. Did it do that in 1895 when Neal was in there and surveyed, and '96, the spring I mean?

A. Yes; I have an idea it did. (R. 1760.)

Mr. CHARLES A. SPURLOCK, called as a witness for the plaintiff, testified in substance as follows:

I think the (character of the) grass which grows on my homestead and the grass which grows on the property occupied by Mr. Heinz (immediately south of my place and within the Neal meander line) is about the same. It consists of a sweet grass, sugar grass, wire grass, and salt grass on the ridges. (R. 1765.)

Cross-examination:

I have seen salt grass down below the (Neal) meander line on the ridges. I don't know just how many ridges there are there. There are ridges in different places down below there (R. 1768); in dif-

ferent parts along the (Neal) meander line and below. The salt grass grows pretty well on top of those ridges. It does not grow on the low ground much. It grows principally above the water line. (R. 1769.)

Mr. THOMAS T. DUNN, called as a witness for the plaintiff, testified in substance as follows:

I think our family were living down there (near Malheur Lake) when the Neal meander line was run (in 1895), but I am not sure about that; I do not remember for sure. I suppose the Neal meander line has been the subject of some discussion in our family, and every other family near the lake for a good many years.

At the time that meander line was run, I was 14 years of age. I was born in 1881. I think we were living there. (R. 1821.)

There is a difference in the vegetation on my property above and below the Neal meander line. On the outside of the line there is sagebrush, and on the lower side it is grass lands mostly, and tules. I could not say how far in feet the sagebrush is from the (Neal) meander line. It comes right to the meander line in places I think, and at other places it is back from the meander line, but I could not estimate the distance in feet. (R. 1824.)

Cross-examination:

I know where the (Lake Malheur Bird) Reserve line is along the north and east side of my land.

Mr. LILJEQVIST. Q. Did the water ordinarily in the spring come to the (Neal) meander line?

A. Yes; it came over it sometimes.

I could not say how far the water came over it (R. 1834); it depended upon the slope of the ground. (R. 1834.)

Mr. LILJEQVIST. Q. In your judgment, was that meander line which separates you from the so-called (Lake Malheur Bird) Reserve (R. 1835), the approximate line of the ordinary high water in the spring, in the early days?

A. Yes.

Q. And up until what time was it such approximate line of the high water? When did the water start to go down here, this present cycle we are suffering from?

A. When did it start to get dry, here, do you mean?

Q. Yes.

A. It seems to me like it has been close to twenty years since this started to change.

I don't remember whether the water came back in 1922 and 1923 up to the north line on my place. (R. 1836.)

Mr. LILJEQVIST. Q. Now, this salt grass strip and wire grass immediately below it, what is your recollection as to that vegetation around the south side of the lake, the east side of the lake, and the northeast side of the lake?

A. Well, sir, around the lake, was salt grass on the outside.

Q. Then that was your recollection of where the water came to in the springtime, this salt-grass strip?

A. Yes.

Salt grass grows clear around on the outside. (R. 1838.)

Mr. LILJEQVIST. Q. Do you know of your own knowledge whether there was any salt grass margin in this overflow land from the Blitzen on the north side of the lake—the Silvies on the north (R. 1839) side of the lake, and the overflow of the Blitzen, westerly from the mouth of the Blitzen on the south side of the lake, above the Neal line?

A. That would be on the west side mostly?

Q. I don't know whether I described this correctly. Do you know of any salt grass strip being along the Neal line westerly of the Blitzen River where it entered?

A. Westerly? Well, that is a different kind of grass mostly over in there. (R. 1839.)

Redirect examination:

I have seen the water over that north line (Neal meander line) on my property.

Mr. BLACKMAR. Q. You did not mean to suggest that the water comes to a certain point every year, did you?

A. Oh, no.

Q. The fact of the matter is you hardly ever see two years alike, do you?

A. No, it varies; different; some years it was high and some years it was low.

Q. And some years it is very high and some years it is very low?

A. Oh, yes.

Q. You can not tell from one year to the next what it is going to do?

Mr. LILJEQVIST. That is leading.

A. No. (R. 1842.)

Recross-examination:

Mr. LILJEQVIST. Q. Where was the salt-grass strip with reference to your north line, the Neal meander line?

A. Oh, that depended on the water, how long the water stayed. The salt grass would not grow one summer if the water was covered over it entirely all the time.

The salt-grass strip growing out along my north line was out a way from the (Neal meander) line lots of times; quite a ways. It is a little hard for me to tell how far; (R. 1844) I could not say. Sometimes it would grow outside of it (the Neal meander line), and sometimes it would grow inside of it. That depended on the years. I cannot tell how far it grew inside of the (Neal) meander line, and how far outside of it; I don't know. (R. 1844.) I would have to kind of guess at that. It might grow away as far as any water; it followed the water.

Mr. LILJEQVIST. Q. How far did the water go back from the springtime to the fall?

A. Well, sometimes it would go back two or three hundred feet, or farther than that. The water would dry up in the summer, you know. The next spring, if it did not come back, it would grow there, start to grow. If the water came back, it would not start to grow; it would not in the old place where it grew before.

Mr. LILJEQVIST. Q. Then substantially all the time you have lived there have you had salt grass along your north line?

A. Well, we have had the salt grass around the water, yes.

I know where the (Neal) meander line is where the Bird Posts are. As a general thing, there has not been a salt-grass strip north of those posts, it has grown on the outside (R. 1845) of them, and right up to the posts in some places (R. 1846).

Redirect-examination:

In some years it (the salt grass) has been the other side of the posts, out toward the (Malheur) lake as the water receded. (R. 1846.) Where the salt grass is depends entirely on where the water has been the previous year. (R. 1846.)

Recross-examination:

The salt grass is the water's margin; it has to have the water just right to grow. (R. 1846.)

Mr. LLOYD B. CULP, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. All the time that you have lived there is there anything (R. 1850) in the way of vegetation which would indicate to you where the lake ended and where the lake commenced?

A. Well, not right south of me, no; there is tules, that is about all I can say, and some hay that is cut on the Showen place. The Spurlock place, he cut lots of hay there when there was water. (R. 1851.)

Cross-examination:

Mr. LILJEQVIST. Q. Do you know where Heinz's place is and the Showen place is?

A. Yes.

Q. Which direction from that was this bank you were talking of?

A. Right east of that is the way I have got it.

Q. Do you know how far?

A. No. I judge a mile and a half; something like that. (R. 1854.)

Q. As a matter of fact there was all kinds of open water between this so-called bank east of the Showen place and the meander line?

A. I don't know where the blame meander line (Neal) is; I cannot tell you.

Q. You don't know whether this bank was near the meander line or not?

A. No, it is down there some place; I don't know exactly where it was.

Q. From your own statement (to counsel for the Government) (R. 1855) the way counsel for the Government asked it: Did the

water usually come over the new meander line, and you answered, "Well, I suppose it did, but not at my place"; is that your judgment?

A. Yes, sir; I believe that is right.

Q. You knew what the word "usually" meant when the Government asked you that question, didn't you?

A. I don't know if I did or not.

Q. You don't know if you did or not. So the Government used a word you did not know and that they did not know, is that (R. 1855) the idea?

A. Well, I don't know just what you are trying to get at now. (R. 1856.)

Q. I am wanting to know on the (Neal) meander line south of your place, didn't the water ordinarily come up there in the springtime in the early days?

A. Yes; I think it came this side of it; yes; you bet.

I am not on that (Neal) meander line.

I know one point on the Spurlock place where it (the Neal meander line) cuts off the corner on his place, and that is all I can tell you. The Spurlock place joins my place, and I know where that meander line is on that place. The water backed up there over that usually in the springtime. It backed up to my place sometimes. (R. 1856.)

Redirect examination:

Mr. BLACKMAR. Q. Do I understand it spreads all out, or just comes up there in the slough?

A. I will tell you the way that works. I think I know. When the water comes down from above in the Blue Mountains it goes on right through my place, and it will run for I don't know how long, but when it fills the lake it begins to back up on my place, see; and it backs up in one corner of my place.

The Spurlock place is right below my place, and the water coming from my place through the Spurlock place, it goes out through some sloughs there; there are some sloughs.

Mr. BLACKMAR. Q. And when it backs up the water backs up in these sloughs?

A. That is it exactly. (R. 1857.)

Q. Do you mean when it backs up it spreads all out over your place and the Spurlock place?

A. Yes; on the low places, but not on the ridges.

Q. Not on the ridges?

A. No, sir.

Q. On your place and the Spurlock place always part of the land has been exposed?

A. Yes, sir; always; always that I ever saw it.

Recross-examination:

The land is exposed in the fall of the year all right. In the springtime the water backed up in around the Neal meander line. It backed up in the approximate vicinity of the Neal meander line.

Redirect examination:

And sometimes it went beyond it, and sometimes it did not go to it.

Recross-examination:

Mr. LILJEQVIST. Q. Usually in the springtime, it backed up to the Neal (meander) line, didn't it?

A. No, sir; not usually; sometimes it didn't get that far—that is, where I know the meander line.

I cannot tell you how far it (the water of the lake) did come from it (the Neal meander line). When there was lots (R. 1858) of water it backed up through the low depressions that I call sloughs (R. 1858–1859), sometimes it didn't back, not enough water to back it up.

We moved in there in 1915. I do not know what the conditions were from 1895 to 1915, twenty years before I went there.

Mr. LILJEQVIST. Q. You are not attempting to say that the ordinary high water in the spring didn't come up to the meander line in front of you when the line was run many years before.

SPECIAL MASTER. You are only attempting to testify to your experience?

A. That is it.

SPECIAL MASTER. You are not giving any views about what happened before you were there?

A. Not a thing.

Mr. LILJEQVIST. Let's put it this way:

Q. What year didn't it come up to the Neal line at the Spurlock place that you can remember of?

A. Well, I would not attempt to tell you, because I don't think I know. If I knew, I would tell you, but I don't believe I can tell you what year. (R. 1859.)

Q. Do you know those dry years?

A. What, when this water did come up, you mean?

Q. No; when it didn't come up.

A. Well, drier than it had been; yes. (R. 1860.)

Mr. CLARENCE W. DRINKWATER, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

The (Neal meander) line was the south line of my property. Then I had about half a mile square fence immediately south of that.

Mr. LILJEQVIST. Q. Now, where did the water ordinarily come in the springtime with reference to that meander line that separated your father's land from the part that you had fenced in?

How far back did the backwater of the lake come on to it in the spring, and where did it come with reference to the meander line?

A. Right along on the west side, pretty close to the west side of father's place there was a low place, or what we call a slough, and

it came around from toward the Lawen section; I just (R. 1880) don't recall where it went; but water came down through there, and then out into those tules, and then the water on the east side I think backed in from the lake.

The water of the lake backed over the (Neal) meander (line) in places; on my father's place not very far. There was a high ridge there, but it backed over the (Neal) meander line around there on the east side on 25 or 30 acres. That was above the (Neal) meander line. The sand ridge on my father's patented land joined right on to the (Neal) meander line. There was a sand ridge practically on the (Neal) meander line at my father's place; I suppose it was sand; I do not know what kind of soil it was; it was a sort of ridge or (R. 1881) high place; the (Neal) meander (line) followed right around this high place of ground. (R. 1881.)

Mr. JEFF CAWLFIELD, called as a witness for the plaintiff, testified in substance as follows:

While I was living on that property on the south side of the (Malheur) lake, I became familiar with the location of the Neal meander line in some of the places, the McCoy. place, the Simmons place, the Reinemann place (R. 1887) and part of the way on the Dunn place.

Mr. BLACKMAR. Q. I will ask you whether or not, Mr. Cawlfield, on the places that I have enumerated, if there was any difference, as you saw it there, after 1900 in the character of the vegetation above the meander line and below the meander line?

A. Well, in some places there wasn't; in some places it was the same on both sides.

With regard to the kind of vegetation above the Neal meander line on my place, there was a knoll where I had the house in that corner that was a little higher than the other, and there was sugar grass around the edges of it. (R. 1888.) On top of the knoll there might have been a little salt grass, but it was mostly sugar grass I think down below.

When we got off the knoll, on my place, the vegetation consisted of tule land in the early days until we cut the tules off and then the sugar grass grew.

In toward the lake and across the (Neal) meander line, the vegetation consisted of tules and sugar grass. It was just about the same as it was above. (R. 1888.)

The character of the vegetation on the Reinemann place when I lived there consisted mostly of sugar grass except out on the edge, south, where I think there was some salt grass. Then on out towards the (Neal) meander line, and across that line the vegetation consisted of some tules at the back end of the field, and sugar grass. The sugar grass and tules crossed the (Neal) meander line, but the grass on his (the Reinemann) place was at the south end.

On the Simmons place, they had sugar grass on the north part of it. On the south part of it, it was about the same as the Reinemann place. There are knolls and one or two sloughs and salt grass.

Mr. BLACKMAR. Q. As you went out to the lake across the meander line, was there any change in the vegetation on the McCoy place? (R. 1890.)

A. No, on the McCoy place I don't think there was a bit of change. That was sugar grass and tules. It was the same as the Reinemann place when I lived there. (R. 1891.)

Mrs. MARY GRIFFIN, called as a witness for the plaintiff, testified in substance as follows:

I was living on that place (the Gerald Griffin homestead) at the time they ran the Neal meander line. (R. 1932.)

The vegetation on our property consisted of tules and salt grass; and on the lower part of the homestead was sugar grass.

It was tules and salt grass on both sides of the (Neal) meander line.

Mr. BLACKMAR. Q. There wasn't any change in that vegetation there that would permit you to identify the meander line, was there?

A. No. (R. 1932.)

Since I have lived up there (on the Gerald Griffin homestead) some years the water came above the Neal meander line, but it has not since 1923. Some years prior to 1923, it did not come above the Neal meander line.

Q. Your water is not very consistent, is it?

A. No.

Cross-examination:

The place on the north side was (R. 1935) patented land. I said that for three years there had been too much water upon it, the patented land.

Mr. LILJEQVIST. Q. How far would the water come up on the patented lands, the backwater of the (Malheur) lake? During the usual high-water season?

A. Well, it would practically cover the entire ranch. (R. 1936.)

There were some small sloughs through the (Gerald Griffin homestead) ranch. (R. 1936.)

I know where the (Neal) meander line is in front of that land (the Gerald Griffin homestead) on the (Malheur) lake; it is down in the southern part of the homestead.

Mr. LILJEQVIST. Q. In the usual season, then, the water would at least come to the meander line, wouldn't it?

A. Yes. (R. 1936.)

Mr. JUDD A. WISE, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

My father-in-law (Mr. McKenzie) owned a place down toward the Narrows. I have been down there many times. I know practically where the water came in the spring time with reference to the (Neal) meander line at his place. (R. 1955.) Different years it varied; some years it got clear out over the deeded property and other years there was not any on the (Neal) meander line even. I do not know where it ordinarily came to.

Mr. LILJEQVIST. Q. Let me ask you a question just exactly the way the Government's attorney asked it, because when I use the word "ordinarily" witnesses seem to hesitate on it. Now, I will ask you

a question, and show you this transcript, and it is a question the Government put to you:

"Q. During an ordinary year and leaving out the exceptional ones, how far out would the water usually back up with reference to the new meander line?"

And your answer was:

"A. As an average year it would back out just to where the new meander line is."

Now, take a look at that. Is that your testimony?

(Thereupon Mr. Liljeqvist handed transcript to witness.)

Mr. BLACKMAR. No; Mr. Liljeqvist, that is not his testimony.

Mr. LILJEQVIST. Q. Is that your statement that you made to the Government when they were investigating this case? (R. 1956.)

A. I don't know.

Mr. LILJEQVIST. If you want to see the original signed statement, we will ask counsel to produce it. I am not trying to catch you at all.

A. I believe it is correct. (R. 1956.)

I have tried to give them (counsel for the Government) my best judgment. (R. 1957.)

Mr. W. A. CAMPBELL, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Well, who are some of the oldtimers who were down there in 1895 near you? (R. 1975.)

A. There was the Grout boy, and the McKenzies, Elliott, Harper, the Dunns, Pinto Tom, that is what we called him: Thomas was his name, but he was nicknamed "Pinto Tom."

Q. He was the fellow who had a spot on his head?

A. Yes.

SPECIAL MASTER. What was his right name?

A. Thomas Thomas was the way I understood his name. And Joe Hill, Mrs. Boland, Alonzo Clark, a man named Bennett, a man by the name of Wilson. I think that is all. Well, there was a man by the name of Harper, but I think I named him.

All those people who I have just named were living within (what is known now as) the present (Lake Malheur) Bird Reserve.

I remember when Mr. Neal ran his (meander) line around there, and most of those persons I have named, in fact, all of them I know anything about, were living on their places at the time Neal ran his (meander) line. (R. 1976.)

Mr. W. SCOTT HALEY, called as a witness for the plaintiff, testified in substance as follows:

I remember when Mr. Neal, the surveyor, was down there, running his (meander) line. I was living on my place (the W. Scott Haley place) at that time, and Mr. Campbell was living on his place. Mr. Ed. Grout, Wren Grout, Pinto Tom—Z. L. Thomas, Jason Bennett, and Billie Gibson were also living down there around the present (Malheur Lake) Bird Reserve at that time (1895). (R. 1988.)

All of those people were cutting their hay down there at the time the Neal (meander line) survey was run. (R. 1989.)

Mr. STANLEY G. JEWETT, called as a witness for the plaintiff, testified in substance as follows: . .

In connection with my duties, it is part of my work to observe plants and trees; woody shrubs and trees have come under my instructions, and to report them in various districts. (R. 1999.)

If my memory serves me right, the posts placed by the Government (indicating the boundaries of the Lake Malheur Bird Reserve) on the south side of (Malheur Lake), have been placed off and on at different periods from 1912; but when the work was finished, I could not say. I am not so familar with the posting on the north side (of Malheur Lake). (R. 2000.)

Mr. JOSEPH KADO, called as a witness for the plaintiff, on redirect examination testified in substance as follows:

The grass or the hay above and below the (Neal) meander line in there (on my property) is practically the same. (R. 2051.)

Mr. ALFRED L. MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

In front of my patented lands I have some other property that I claim on unsurveyed land. There must be close to 1,400 acres fenced in there. All of the unsurveyed land, about 1,200 to 1,400 (acres) is below the (Neal meander) line, and the patented land is not included in that; I was speaking only of the unsurveyed (R. 2067) land.

There is no bank at all where the Neal meander line passes across my property. It is very level, and you can not tell any difference in the land at all. The grass is just as good below the patented land as it is above, except this year it is very dry on the surveyed land.

Since 1888 we have had on my property some sugar grass, some foxtail, salt grass, wire grass, and wild grasses.

Mr. BLACKMAR. Q. And I presume that the different kinds of grasses grow according to the amount of water that you get on them?

A. No; it seems to me like it has always been that kind of grass ever since I have been there. Of course, there is tules. (R. 2068.)

I cannot just recall the year we first ran our fence below what is now the Neal meander line (R. 2069–2070), but I know we would keep building the fence down; as the stock would come around the lower parts of the fence, we would build a little farther out every year. (R. 2070.)

SPECIAL MASTER. What did you mean by your last answer, that as the cattle went down you pushed your fences out?

A. Well, it seems as though since 1917 it would dry down, and stock, on account of the feed being short outside, would crowd next

to the edge of the lake, and would go down farther into the tules, and farther down, and we would build a fence on out to check the stock.

We built the fence to check the stock, and hold outsiders from coming in. We had a fence on the north line of the unsurveyed land.

Mr. BLACKMAR. Q. Did you have any fences north of the present location of the Neal meander line at the time that line was run in 1895?

A. Yes, sir; we had a little fence. (R. 2070.)

Q. Were there other ranchers who lived near you, say between 1890 and 1900 who extended their fences north of the Neal meander line?

A. Yes, sir.

Mr. Thomas T. (Ted) Dunn extended his fence on (beyond the Neal meander line) from where he had it.

There has been a good deal of fences that have been built in there this year. (R. 2073.)

Cross-examination:

Mr. LILJEQVIST. Q. Now, when you first went in there, outside of that 1889 year, when the waters came back there after '89, where did the waters come with reference to the entire north line from the lake? How far into your deeded lands, if at all? (R. 2082.)

A. Some years it would go plumb over the line, other years it didn't come up to it. I mean some years the water would flood over, and when the (Blitzen) river was high in the spring, it would come down and overflow the land, and of course——

Q. (Interrupting.) From the (Blitzen) river?

A. Yes, sir.

Q. That is, the western part of your land?

A. Yes.

The eastern part of my land must have been flooded by the (Blitzen) river, because it (the water of Malheur Lake) never raised until the river would come down. (R. 2082.)

After the (Blitzen) river came down and the (Malheur) lake raised, the water would sometimes back south over the (Neal) meander line; in other years it would not quite come to the (Neal) meander line.

The (water of the Blitzen) river and (of) the (Malheur) lake together ordinarily gave me a crop on the unsurveyed part (of the land) to the north of my place.

Mr. LILJEQVIST. Q. When the (Blitzen) river and the lake merged together, you could not tell what was lake water and what was river water, could you?

A. Yes, I believe you could. Some parts looked as though you couldn't, but if you would notice—I noticed one year, one year I remember very plain, that I was trapping muskrats in there, and my boat got away from me and floated away and I had to wade out quite a little ways to catch it.

Q. This is what I cannot understand. This Government survey shows the elevation from 91 (4,091) to 92 (4,092), which is from a foot (R. 2083) to two feet below the Neal line.

A. Yes.

Q. What I am trying to find out is, didn't the lake come back to your Neal line most of the time?

A. Yes; the water did. It never came back to my Neal line unless the water was high in the river.

In the last two or three years the water (of Malheur Lake) has not come back to the Neal (meander) line.

Mr. LILJEQVIST. Q. I mean except these last ten years, or say when you had so much dry weather. (R. 2083.)

A. Yes; I don't think it came up there in 1888 or '89 or '90; I won't say positively about '90, but I think right along in that time it never did come back.

We had some other dry years. 1917 was a dry year. The water did not come back in 1917.

Mr. LILJEQVIST. Q. Outside of those normally dry years did it ordinarily come back?

A. Yes, ordinarily; ordinarily the water came over it.

Q. That is what gave you the crop?

A. That is what gave the crop.

Q. And one of the chief values on your land has been the fact that immediately below you the waters have flooded it, isn't that a fact?

A. The water has flooded it from the (Blitzen) river, yes, sir; when the (Blitzen) river was high it would run down in there and the land always seemed to me like it was so level that when the (Blitzen) river would come down onto part of the land it would just simply stand there. (R. 2084.)

Q. Let me ask you this question: In all of these years have you claimed any riparian rights on your patented land out into that lake?

A. Yes.

I remember where the water was in 1922. We mowed quite a (R. 2084) little hay down in there below the (Neal) meander line.

I believe I remember in 1922 a party of Government and some State officials came in there (Malheur Lake). I remember you; I remember speaking to you on the grade between Billy Dunn's place and Springer's place.

I do not remember just exactly about the water in that particular year, but there has been so many years—now, I remember very plainly it has never—it has been a good many years, but what we have mowed down the west line of our fence plumb to the Spring branch in order to give our stock water. The tules would get pretty high in places, and they are there yet. And we would mow a broad strip from the ground that we had mowed for hay and was used for hay and pasture; when these tules were pretty high we

would mow a pretty big broad strip down to the spring water place, because that was a good watering place, and easy for cattle; and in that way the stock would go through the tules and find the water and would not do without the water for so long before they would break a road; and we have done that, and always (have) done that. (R. 2085.)

I was there when Mr. Neal ran his (meander) line. (R. 2089.) I did not hold a rod or anything for him; I never helped him (R. 2090) do any of the work, but I saw him and spoke to him. That was in 1895. That was pretty high water. I don't remember where the water was that particular spring with reference to that (meander) line. I never thought much about it.

Mr. LILJEQVIST. Q. Let me ask you this, Mr. Marshall: What is the fact out in front of your land where Neal ran his line. Wasn't that the line where the water approximately came in the spring?

A. I believe it was when he ran that line.

I believe he (Mr. Neal) could have gone a mile down on that land, just as easily as where he (Mr. Neal) did (run his line).

I do not know what time he (Mr. Neal) ran his line.

Mr. LILJEQVIST. Q. He ran it in the fall, the evidence shows conclusively.

A. Yes, he could have run a mile down as easy. (R. 2090.)

Q. In the springtime of that same year, and many a year afterwards, isn't it a fact that the water came back to the line?

A. Oh, yes.

Q. Where he ran the Neal line?

A. Oh, there are a good many years the water was along that line. Every year the (Blitzen) river was high the water was along that line, and even on the surveyed lands. (R. 2091.)

Q. Are you attempting to testify in this case that Neal did not run his meander line along the north line of your place at ordinary high water?

A. I am not attempting to do nothing. (R. 2095.)

Mr. JOHN EMERY GRAVES, called as a witness for the plaintiff, testified in substance as follows:

I can not say that there is any particular difference in the vegetation on my deeded land and (that) on the (Lake Malheur) Bird Reserve immediately south of that land; only a different kind of grass. Of course, on those ridges there is a salt grass that grows there that you would not find down in those low places, in the sloughs, and lower land. (R. 2106–2107.)

Since I have been there on my place there has always been salt grass there. We have some sugar grass up there and wire grass and different kinds of grasses. Those same grasses grow south of the Neal meander line. And south of the Neal meander line there is some salt grass on the higher ridges down there. (R. 2110.)

Cross-examination:

The salt grass grows on the higher ground, but then it will grow in water if it does not get too high or goes over it before it gets started.

Where the water floods the land every year the salt grass grows; if the water goes up over those ridges, up over this grass it makes quite a great deal more growth. Generally it is a short grass, but I have seen it a foot high; and sometimes 15 inches high where the water would come up there. There is salt grass practically all over the knolls. (R. 2110.) Generally immediately below the salt grass, water grass, kind of a round grass, will grow; below that comes the sugar grass, and then lower down comes the tules. (R. 2111.)

I am not so much familiar with the eastern part of the (Malheur) lake, as I am the other part.

Mr. LILJEQVIST. Q. Do you know where there has been a salt-grass rim around that lake for years?

A. Oh, yes; I have been clear around it, and I know there is salt grass.

Q. Has there been any rim substantially above the spring water mark of salt grass around the eastern part of the (Malheur) lake?

A. Well, to the best of my knowledge there is more or less salt grass around the entire lake.

Q. Now, Mr. Graves, this place of yours prior to 1920, what would you say from your experience as to where the water of the (Malheur) lake backed up with reference to your Neal meander line?

A. Well, in those years—of course, you couldn't hardly tell as to what river those waters came from; but since these last years, when it has been dry, and we haven't got any waters (R. 2111) from the Silvies (River), and the water has been coming from the Blitzen (River), it is easy to tell where this Blitzen (River) water comes from, and how far up it will come onto the land.

Q. All right. Now, as I understand it, the Blitzen River has flowed down into the lake at times and raised the level of the lake, when the Silvies (River) didn't feed it at all?

A. This water didn't hardly get into the (Malheur) lake that would come from the Blitzen (River) in these dry years; it never raised the (Malheur) lake practically. The sloughs and the natural (R. 2112) channels go over, and go onto my land.

Q. How long has it been since the Silvies (River) has gone over your land?

A. My golly. It has been quite a while; ten years or more.

I haven't gotten any water on my land except from the Silvies River. In times past I have gotten it from the Blitzen River. In the last ten years quite a bit of it (the water) has come from the Blitzen across the entire lake, while the Silvies River was dry.

The Blitzen River raised the waters of the (Malheur) lake on my place not quite up to the (Neal) meander line. (R. 2112.)

Mr. LILJEQVIST. Q. Well, now, in the days when the Silvies went in there, of course, the waters from the Silvies fed the lake too, didn't they, before it dried up I mean?

A. Part of it, if we got it before it got to the lake.

When both the Silvies and the Blitzen Rivers were feeding the (Malheur) lake, the lake spread out, and the water would come past the Neal (meander) line quite a little ways; I imagine from half to three-quarters of a mile in some places, and I would get some benefit to my deeded lands then. (R. 2113.)

The water I think has come back to the Neal meander line since 1920, somewhere along about 1922. (R. 2116.)

It has been 10 or 12 years, as I remember, since the water got up to the (Neal) meander line from the (Malheur) lake onto my place; maybe (R. 2121) not quite that. (2122.)

Mr. JOE ORMAND AUSMUS, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Since I have been in there (on the Ausmus, Joe Ormand, also Ben place) I think there is one post on the Neal meander line where I have seen the water come to it in the springtime. I can show you where that post is located on the map. (Plaintiff's Exhibit 3.) It is right there [witness indicating on map] right to that point. The water comes just to the (Neal) meander line corner. I think that is about on the level of the (Malheur) lake.

Mr. LILJEQVIST. That is just below lot 11—it is the meander line corner below the Figure 11 in section 21, township 25 south, range 32½ east, north of the lake, isn't it?

(Witness does not answer.)

SPECIAL MASTER. What is the answer? (R. 2135.)

A. I don't think so.

Mr. PECORE. That is not a meander corner, Mr. Liljeqvist. That is one of the breaks in the line.

Mr. LILJEQVIST. All right.

Mr. PECORE. It is on the south boundary; you might say the southwest corner of lot 11, of section 21, township 25 south, range 32½ east; and the elevation is between 4,092 feet and 4,093 feet.

Mr. LILJEQVIST. All right.

I saw the water there in 1904; it was also there in 1917 and 1922. Those are the only years I would be sure of.

Mr. LILJEQVIST. Q. There may have been other years, but you couldn't be sure of them?

A. I couldn't be sure of them. (R. 2136.)

Mr. LYLE B. HILL, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I owned some patented land along the (Neal) meander line, and I do now. (R. 2143.) The Marshall place joined it immediately to the east. I bought that land from the Bunyard estate. I think I bought that patented land in 1928 or 1929; just a couple of years ago; this is the third season. We rented it before we purchased it for about two or three years. (R. 2144.)

Mr. LILJEQVIST. Q. At any rate, since you rented it, or owned it, did the water of the lake back up to that Neal line?

A. No; I do not think the water of the lake ever backed up since I was there.

Q. How close did it come to the Neal line since you rented it, or owned it?

A. You see, the Blitzen River comes in there; I would say about a quarter of a mile east of the north corner of the slough there, the water backed up in there. (R. 2144.)

The Buckland place (Hill Brothers' place, formerly Star Buckland place) is not located right in front of us (the Hill Brothers' ranch). It is a little bit west of north.

Mr. LILJEQVIST. Q. How did the water get into that area from the lake?

A. It gets in from the Blitzen River.

Q. Does the lake back onto that since you have had it?

A. No; I do not think the (Malheur) lake does, not since we have owned it. (R. 2145.)

I do not know what claim we are making to that particular land. We bought whatever rights there are, if there are any rights.

SPECIAL MASTER. I suppose you are claiming whatever the law gives you?

A. Yes.

Mr. LILJEQVIST. Q. You have all been on there for a great many years, and you are hanging onto it properly, and trying to get it, aren't you. (R. 2145.)

A. Yes.

Mr. LILJEQVIST. I might ask you this question:

Q. If this land is withdrawn from entry by the Government, do you know of any way that you could get this land?

Mr. BLACKMAR. Well, I assume that that is touching on the legal propositions involved.

Mr. LILJEQVIST. Q. Have you ever been promised this land by any official of the Government?

A. No.

Q. They have never interfered with you in building your fences?

A. No. (R. 2146.)

Mr. WILLIAM HENRY MCKENZIE, called as a witness for the plaintiff, testified in substance as follows:

I know where the Neal meander line is in the vicinity of the Narrows; I know where the rocks are, on both sides of the Narrows; I know where the survey is.

Mr. BLACKMAR. Q. Now, down around the Narrows is there any difference in the vegetation above the Neal meander line, and below the Neal meander line?

A. So as to be able to identify the meander line and tell where it is?

Mr. BLACKMAR. Yes.

A. No, sir; I don't think that anybody can tell by the growth of vegetation where the meander line is.

The vegetation near the Neal meander line consists of sugar grass, tules, salt grass and wire grass. (R. 2147.)

Cross-examination:

I know where the rocks are on the Neal (meander) line in front of my father's place; that is the only way I know where it is. The rocks of the survey. (R. 2153–2154.)

Mr. LILJEQVIST. Q. In many years didn't water come back to those rocks every spring?

A. No, not every spring; it has been different every spring. There were never two years alike.

Q. In ordinary years didn't it do that?

A. I don't know what you would call ordinary years. There have never been any two years alike.

Q. That may be true. Sometimes it was higher and sometimes lower?

A. Yes, sir. (R. 2154.)

Q. Even in 1917, and during the last few years it came up to that Neal meander line in front of your father's place, didn't it?

A. Yes, I guess there have been years when it did that.

There have been years that I remember it did that. (R. 2154.)

I could not tell you how many years from the time I went in there and excepting 1888 or 1889 that the water did not come to those rocks at the Neal meander line on my father's patented land. (R. 2156–2157.) There have been more dry years than there have been wet years, I know that, since I knew it.

I remember in 1914 when some engineers went all over that (Malheur) lake and measured that lake and the depth of the ice, but I do not know exactly how it (the water) was that year. I would not say whether it was an ordinary year or not. I think it was 1914, but I do not remember that it was that year, although I remember the incident. I would not say for sure whether it was high water or low water that year. (R. 2157.) I do not remember where the water came that year.

Mr. LILJEQVIST. Q. Well, these years that you said were drier, how far below the Neal meander line did the water come outside of 1889 and 1917, and the last eight or nine years—or rather six or seven years?

A. Oh, probably a mile.

I can not tell you where the water came in the springtime in the years other than those dry years I have enumerated, because I never saw it come to the same place twice. I could not describe the place where it came. It would be hard to describe between what points it came. The land was all alike (R. 2158) there, or practically (R. 2159) so. I would not undertake to describe where the water came to. Some years it came above it (the Neal meander line).

We got benefit from the waters flooding my deeded lands, and there have not been very many years that we had water on the deeded lands. We got crops on my deeded lands by subirrigation. The soil on my deeded lands is lake bed. I do not know what soil you would term it. Swamp and tules. (R. 2159.)

Mr. FRANCIS W. TRISKA, called as a witness for the plaintiff, testified in substance as follows:

While I was in charge of the (Lake Malheur) Bird Reserve there were a few posts placed in there to indicate the location of the Reserve. As well as I can remember there were about three on the north side of the (Malheur) lake, and two on the south side (of it).

During the period that I was there I recollect but one season when the water reached up to some of those posts; but never to all of them; two years I think the water reached right up to the posts. (R. 2200.)

Cross-examination:

I think I was pretty familar with all that so-called Government land in this case. Even though there were no posts around it, I tried at the time to familiarize myself fairly well with what the Government called a Bird Reserve. In the places where there were no posts I did my patrolling because there were certain lands that I had to go by.

At times I took up with the different settlers to find out where the Neal (meander) line was.

In those days (1915 to 1918) I went over the greater portion of the (Malheur) lake.

I was there three years. (R. 2201.)

I was out into the western part among the tules and the channels. I suppose fellows sneaked out there once in a while. (R. 2202.)

Mr. LILJEQVIST. Q. Now, I want to ask you a question, and I will try to use the same language of the Government's attorney, so that I won't get called down for it. Here was your statement, and I will show it to you, and I will ask you if this statement was according to your recollection.

Mr. BLACKMAR. Before you do that, possibly we ought to find out if that statement was signed. My notation is that Mr. Triska never signed his statement.

I remember my statement being taken by a Government attorney.

Mr. LILJEQVIST. Q. They quizzed you and asked you questions?

A. Not very much. (R. 2202.)

SPECIAL MASTER. I suggest you ask him if he was interrogated along such and such a line.

Mr. LILJEQVIST. For the record, I wish to state this is a copy of his statement that was given to me by the Government, so that I assume it is correct:

"Q. I would like for you to tell me something about the physical characteristics of the lake area as you have known them, using just the ordinary year and excluding the exceptional years."

Do you remember being asked that question?

A. Well, I don't know whether I do or not.

Mr. LILJEQVIST. Did you answer as follows:

"A. It was my fortune, I think, to be there when the years were just about uniform; not much variance at that time, and I navigated with a little boat and paddled all around over that (R. 2203) lake. Nearly every bit of the Government land was under water. There was weeds in certain parts of the lake rather late in June and they would come up and there would be just a mass on the rudder of the boat. I would have to clean them off before I could go. There is a certain food that ducks and geese and other birds feed on in the lakes."

Now, is that your recollection of the question and answer (R. 2203) at that time?

A. Well, it has been quite a while ago, and I wouldn't say exactly.

Q. Is that your recollection of what the facts were?

A. Yes. As far as the weeds were concerned, I recollect them.

Q. What about the rest of it?

A. Which part?

Q. The first sentence.

SPECIAL MASTER. Take his whole answer and read it in sections, and state whether it is your present recollection or not.

(Thereupon the witness proceeded to read document.)

SPECIAL MASTER. Read it aloud, Mr. Triska.

Mr. LILJEQVIST. The question is:

"Q. I would like for you to tell me something about the physical characteristics of the lake area as you have known them, using just the ordinary year and excluding the exceptional years." (R. 2204.)

And your answer was:

"It was my fortune, I think, to be there when the years were just about uniform; not much variance at that time, and I navigated with a little boat and paddled all around over that lake. Nearly every bit of the Government land was under water."

Now, did you make that answer?

SPECIAL MASTER. In the first place, I suggest you divide it into several parts. (R. 2204.)

Mr. LILJEQVIST. All right.

SPECIAL MASTER. And then ask him if such and such was the fact.

Mr. LILJEQVIST. Yes.

SPECIAL MASTER. That the years that you were there, 1915 to 1918, were nearly uniform? (R. 2205.)

A. Yes, sir; nearly.

SPECIAL MASTER. All right. Then the next one.

Mr. LILJEQVIST. "Not much variance at that time."

A. Not that I recall, no.

Q. And you navigated with a little boat, did you?

A. Yes.

Q. And you paddled all around over that lake, did you?

Some places I did; sometimes I went one place, and then sometimes another place.

Q. And it was true that nearly every bit of the Government land was under water?

A. Well, I had at that time figured it was, but I never checked up close on it, because I think it might vary.

SPECIAL MASTER. And the next is with reference to the weeds?

Mr. LILJEQVIST. The next is with reference to the weeds.

SPECIAL MASTER. All right.

Mr. LILJEQVIST. Q. Well, that is substantially the way you remember it, isn't it? (R. 2205.)

A. Yes, as near as I can remember it. (R. 2206.)

Redirect examination:

Mr. BLACKMAR. Q. Reading also from the same statement, I will read the following question and answer:

"Q. How far would the water usually come up approaching the new meander line?

"A. It would run over past the meander line in some places and some places it would recede from the line. Sometimes a little patch of island would be exposed. The topography of the land (R. 2206) had a whole lot to do with it."

Mr. LILJEQVIST. I will admit that he also so stated, if you want me to.

SPECIAL MASTER. That will avoid asking the witness a question, if Mr. Liljeqvist's stipulation is accepted by counsel.

Mr. BLACKMAR. I will accept the stipulation. (R. 2206.)

Mr. HENRY OTLEY, called as a witness for the plaintiff, testified in substance as follows:

Immediately south of those lines within the (Lake Malheur) Bird Reserve, the Otleys have some land under fence; I expect they have 200, maybe 250 acres. We have no improvements of any kind on that property other than the fences. We have used that property for a good many years. Part of my father's lifetime he used it. My father homesteaded down there in about 1889, I believe (R. 2211), and a lot of this land he acquired since by buying.

Mr. BLACKMAR. Q. I am referring now to the land within the Bird Reserve when he took possession of that.

A. Well, part of that was land—he didn't take possession—but he bought other land. I don't know I could tell the exact date of that or not. I suppose I would say around 1904, or such as that.

During the last ten years the water we have obtained to produce the hay crop on that land within the (Lake Malheur) Bird Reserve, came from the (Malheur) lake. In the last ten years we have had a few years when we have also gotten water on that land from the Silvies River.

I have knowledge of the location of what is called the Neal meander line. There is no bank up there along the Neal meander line across the Otley properties.

Mr. BLACKMAR. Q. I assume that since you have been familiar with that land up there for some years you have seen the lake come (R. 2212) up above the Neal meander line, have you?

A. Yes, sir.

Q. When it comes up above the Neal meander line does it spread all over the country, or is it pretty well confined to the (R. 2212) sloughs?

A. It runs up a few sloughs, and it spreads—close to the meander line it spreads over the country pretty well.

Q. And some years when the waters from the Silvies River come down there and join with the back-up of the lake, then you get considerable spread around there, don't you?

A. Yes.

Q. Have there been years since you have been living there when the water did not come up as far as the Neal meander line?

A. Do you mean besides the last ten?

Q. Yes.

A. I don't believe that there has.

Q. Previous to that time?

A. It frequently came over the—the flood waters, I believe, every year came up to and above the Neal meander line. I say ten years. I would say since—I would say before 1917. We had some dry years in 1918. That is a little longer than ten years.

Q. In there where the Otley properties come down to the Neal meander line and from there on across to that property in the (Lake Malheur) Bird Reserve which you have fenced, is there any change of vegetation at the Neal meander line so that a person coming down across that place to the south could tell where the meander line was by the change in vegetation?

A. No, sir. (R. 2214.)

Mr. HADDEN ELLIOTT, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

My father was Henderson Elliott, and he had some patented land on the (Malheur) lake, down near the Narrows. I lived there from the time I was just a little fellow.

Mr. LILJEQVIST. Q. Now, I want you to describe the way the water came up to that deeded land, or onto the deeded land in the springtime from the very beginning. Just describe in your own way what you saw from year to year.

A. It just came down there and backed over the land.

Q. Now, in your judgment, the water in the springtime came to the Neal (meander) line of your father's land, or beyond it? Did it come at least to the Neal line? I will put it that way.

A. If there was any water it would generally come over the meander line. I don't know just where the (Neal) meander line was.

We got some benefit of the water by reason of it overflowing that deeded land. I do not know how much deeded land we had; nor do I know how many acres we got a hay crop from on that deeded land. (R. 2222.)

Mr. LILJEQVIST. Q. When did it begin to fail to come up there regularly?

A. Oh, along, as well as I remember, about 1908 I think, 1907 or '08, somewhere along in there. (R. 2223.)

Mr. JOHN MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

There was no change in the vegetation where the Neal meander line crossed (my place) which would enable a person walking down to tell where the meander line was. The vegetation above the line was just exactly the same as below it.

I have seen salt grass on the knolls below the (Neal) meander (R. 2234) line in the present limits of the (Lake Malheur) Bird Reserve, and I have seen salt grass on the knolls outside of the (Neal) meander line. I have cut it for hay in both places; I have mowed lots of salt grass for hay. Cut it up. (R. 2235.)

Cross-examination:

I do not own my lands now; I sold them to James Bunyard. My place is north of Springer's; it is right on the (Neal) meander line. I had a half a mile along the (Neal) meander line.

I have seen times when that place was covered with water all right enough, when we could not get hay only on the (R. 2240) high knolls.

I do not think the (Malheur) lake ever backed up all around that point on the George Marshall place; it was the overflow of the Blitzen River; it flowed down into the lake.

Mr. LILJEQVIST. Q. Didn't that overflow, that with the Silvies, get sufficient to fill that (Malheur) lake up so that it came around that point?

A. No, I don't think so. Now, here is my reason for saying that. There were times in July, along in the middle of July, when we would just about get ready to hay, and would hay, and the Blitzen (R. 2241) River would overflow and run down in there, caused probably from the French-Glenn Livestock, (Co.), as I thought, pulling their head gates above and flooding that country in there. We couldn't hay for a month later, because it would take that long. They would get ready to hay, and pull the head gates out above. In July, and maybe August. One year we put up hay when it was snowing to beat the band.

Q. Late in the fall?

A. Yes.

It was late before we could get that hay stacked. (R. 2241.)

That was back inside this (Neal) meander line.

I would say my homestead was back from that point as far as three-fourths of a mile, and possibly a mile back there.

The waters of the (Malheur) lake came back in there when it was an extremely wet year.

I would not say when it did that; it ran in cycles. There would be probably four years of wet, it would be too wet, too much water; and I would say four years of dry. Now, I think along about 1893 and 1894, if I remember right, the way I remember it, when my youngest sister taught school at the Narrows; those were extremely

wet years. It was along in 1894, maybe 1895, I would not be sure about those dates.

I was there when Mr. Neal ran his survey. There was a committee of settlers that went with him. (R. 2242.) They were to see that he ran his line right. (R. 2243.)

Mr. ALPHENA VENATOR, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. As you came down from the north across this Neal meander line into the (Lake Malheur) Bird Reserve, is there any difference in the vegetation?

A. None that I could see. Below and above, you mean?

Mr. BLACKMAR. Yes.

A. None that I could see.

Q. So that a person traveling down there could not tell where that meander line was by a change in the vegetation, could he?

A. No, sir.

During the time that I have lived up there on the Jordan place and the Swan Lake Field, I saw the water at different heights in different years.

In certain years that I was up there, the water went up above the (Neal) meander line (R. 2323–2324) at certain portions of the line. Some years it didn't go to the Neal meander line.

Mr. BLACKMAR. Q. Generally speaking, on the north side of the lake, along there at the Spurlock and the Otley places, and the Jordan place, from what source did those people get their water?

A. Ordinarily from the Silvies River. If the Silvies River did not run, it did not submerge them, especially the Jordan ranch, and the Oard ranch, particularly—the upper end of the Oard, and particularly all of the deeded lands, you might say, which were irrigated by the Silvies River—if it did not run, it did not submerge their lands—the Silvies River did not submerge them. They had dams. (R. 2324.)

Cross-examination:

I have seen the water come out to the Neal meander line. Some years it came out there and some years it would not; it would be like it is now. (R. 2330.)

Mr. MOTT V. DODGE, recalled as a witness for the defendant, testified in substance as follows:

Mr. LILJEQVIST. Q. Now, Mr. Dodge, in your work around the lake, did you notice anything about a change of vegetation where it was unaffected by the overflow of the Blitzen and Silvies above the water line of the lake, or was there a line of the lake indicated by vegetation? If so, what?

A. Well, I would state it this way, if I may, Mr. Liljeqvist: That in my observation salt grass grows because of an alkaline condition of the soil, if there is water enough to grow it; and for that reason, if the body of water for some time, or some term of years, backs up

to about the same (R. 2477) point, as it recedes it will naturally deposit salts if they are in solution, if it backs up closely to this point for a term of years it is very likely salt grass will grow up and form a border at that point. There are places on the lake where it is quite pronounced. There are other places where it is very hard to follow.

Q. And in what places is it pronounced?

A. It is pronounced along the east shore of the lake. When I first knew the lake it was more pronounced than it is now. There are other places in the northwesterly part of the lake that it is apparent, but not as well defined as in the easterly part of the lake.

I have known Malheur Lake quite intimately since 1910 and 1911, and I have been there at all stages of the water practically.

Mr. BLACKMAR. Before the witness answers that question, let me ask him just one question: Have you ever run that Neal meander line clear around?

A. I have not. (R. 2478.)

Q. Approximately how much of that line have you followed?

A. Oh, I probably have observed more or less closely possibly a third of it. (R. 2478.)

SPECIAL MASTER. What is the pertinency particularly at this stage of the proceedings in that question?

Mr. LILJEQVIST. I never have been able to understand what the Government is claiming in this case, because they never made it clear in their opening statement.

SPECIAL MASTER. Well, they put in the field notes, and there was a colloquy the other day which indicated that they were not going to seek to surcharge the Neal meander line.

Mr. LILJEQVIST. If I was sure that that was the Government's position, I would not think of proceeding further; but I always had a secret suspicion there would be a contention in this case that has not been disclosed.

SPECIAL MASTER. It could not be surcharged, except for fraud or something akin to it, and I think Mr. Blackmar said that Mr. Neal did about the best he could, or some words to that effect, and I suppose that was in the realm of impossible strife.

Mr. LILJEQVIST. Well, that may be. Personally, I have felt, and will urge before your Honor and the Supreme Court, that this question of the Neal line, where he ran it, is not an issue in this case. I think neither under the pleadings, nor the facts, can they challenge the accuracy of that survey. That is my position, and has been.

Mr. BLACKMAR. I do not want to be misunderstood about (R. 2479) this matter, and I do not want anything that I have said in this (R. 2480) case to commit the Government to the position that the Neal meander line was correctly run.

SPECIAL MASTER. I know your point seems to be that there may be grave doubts about that, but you are not going to have a controversy over that in this case.

Mr. BLACKMAR. I do not think it is an issue in this case.

Mr. LILJEQVIST. All right, I will let it rest right there. (R. 2480.)

Mr. GEORGE M. BENSON, called as a witness for the defendant, testified in substance as follows:

I do not think that I can state where the water came with reference to the Neal meander line on the east side of Malheur Lake because I never had any Neal meander line in mind. (R. 2513.)

When I went in there (Malheur Lake) in the fall of 1909 I was not familiar with where the Neal meander line was located near my cabin; I did not know where it was; now I know where it is.

Mr. LILJEQVIST, Q. To what extent during the springtime did the water in the vicinity of your cabin come to that new line since 1909? How many years?

A. I have seen it several years. It crossed the flat country, right through, right down along the creek.

Q. I am talking about the lake. From 1909 on, how many years did you see the water come to the meander line where it is near your cabin?

A. I could not say how many years, but I have not seen it up there the last—I guess that year I trapped, from 1918, 1919, and 1920. Well, 1928 I believe was a reasonably high year—that was within about 100 yards I should judge.

Q. 1928?

A. Yes.

Q. In '22, where was it with reference to your cabin?

A. Probably about 50 yards I guess from the cabin.

Q. North of the cabin?

A. It would be east of the cabin.

Q. Let us get during the period before it began to get dry. (R. 2517.) From 1909 to 1917, was it or was it not frequently in the springtime up to the Neal line?

A. Well it was pretty well up there to it. Probably not over 20 or 30 steps away. (R. 2517-2518.)

Between 1926 and 1928, I drove the stakes for the Government around the Neal meander line. I never knew of any there prior thereto. Prior to those stakes we just used the water area for patrolling purposes—location of the fields, fences, things like that. (R. 2525.)

I do not remember the early days with reference to whether the water came in the springtime to the stakes on the Neal meander line; I did not have much occasion to go around there. I do not remember between 1909 and 1917 whether the water did or did not in the springtime come up to the Neal line.

Mr. LILJEQVIST. Q. You remember testifying in the water adjudication case, in behalf of the Government, don't you?

A. Yes, I remember it.

Q. In that case, did I ask you this question:

"Q. From your observation, will you state whether or not in 1908 and at all times subsequent thereto, at ordinary high-water periods of the lake, the lake came up to that meander line, in your observation?

"A. Yes, I think it did."

Q. Was that your testimony?

A. Yes, that's probably it.

Q. Then Mr. Staley cross-examined you and he asked this question:

"Q. In the ordinary high-water years, did the water rise to the (R. 2526) meander line all the way around the lake?

"A. Yes, sir.

"Q. The meander line is higher in some portions of the lake as (R. 2526) far as elevation is concerned than in others?

"A. Yes, sir.

"Q. Now, in ordinary years, did the high-water mark in the portion of the lake where your claim is located, come up above the Neal meander line?

"A. Yes; I believe it did."

Q. Was not that your testimony given in that water case?

A. I think so.

Q. Is not that your judgment still?

A. Well, of course, a lot of that there—I would not know how to find ordinary years. After I heard the others testify I found out I didn't know what an ordinary year was.

Q. Then in that case I asked you:

"Q. In 1922, when my honorable opponent, Mr. Staley, was over here along about June 10th, 1922, the water was substantially at that Neal meander line on the eastern side of the lake, wasn't it?

"A. Oh, yes; out past it."

Q. Was that your testimony?

A. Yes.

Mr. STALEY. Yes; and I say so, too.

Mr. LILJEQVIST. Mr. Staley testifies the same thing.

Mr. COLLINS. Did you know where the Neal meander line was at that time? (R. 2527.)

A. No; I didn't at that time.

Q. Did you see the water there at that time?

A. I didn't on that trip, but I saw it that season out there.

Mr. LILJEQVIST. Q. Didn't you testify at that hearing:

"Q. Can you estimate how much the open waters covered?

"A. Well it covered practically all within the meander line, and I would not hardly know how to estimate how much outside of it. In places it would reach out half a mile sometimes beyond the meander line."

Q. Did you say that?

A. I guess that's all right.

Mr. COLLINS. By that you mean that you said that?

A. Yes.

Mr. LILJEQVIST. Q. That was your best judgment and observation, wasn't it?

A. Yes; my best judgment. (R. 2528.)

Cross-examination:

Mr. COLLINS. Q. Now, in your question here which you answered in the hearing in the water adjudication case, when you were asked "Can you estimate how much the open water covered?" and you answered, "Well, it covered practically all within the meander line," did you mean that the open water was within the meander line; was that what you meant, or what did you mean?

A. I meant the open water was within the meander line.

Q. You didn't mean the entire area within the Neal meander line was open water, did you?

A. No. (R. 2536.)

Q. As a matter of fact, you could not estimate the portion of open water, could you?

A. Not very accurately. (R. 2536.)

Q. Were the conditions of the (Malheur) lake with reference to the water such that there were no two years alike?

A. Usually.

Q. When you stated in the same answer to that question that in places it, the water, would reach out half a mile sometimes beyond the meander line, you meant in a few places, didn't you?

A. Yes.

Q. Did that often occur, or did it depend upon the conditions of the water year?

A. It depended upon the amount of water.

Q. That didn't occur very often, did it, since 1909?

A. No.

Q. Looking at the Neal meander line as a whole, it didn't occur relatively to any area of importance, did it?

A. No; I don't think so. (R. 2537.)

Q. When you first went there, and up to the time you put your stakes around this Reserve, could you tell where this Neal meander line was as far as this vegetation was concerned, or anything of that sort?

A. No.

Q. There are no banks, are there, to the lake?

A. There's banks on the east side, but the line is a long ways from those banks.

Q. That is true as to the rest of the lake, substantially?

A. Yes. I had reservation signs set along this bank before it (R. 2540) was surveyed; after I had it surveyed, why, the survey was half a mile inside, right in the flat part of the lake, and I thought that was the Neal line.

Q. And you have had the same situation in other parts of the lake? (R. 2541.)

A. Yes; I have had to move several of those signs; several of them were out on deeded land.

Q. And you thought they were out on the Neal line at that time?

A. Yes. (R. 2541.)

Redirect examination:

Mr. LILJEQVIST. Q. What did you observe about the salt grass around the southern and southeastern part and the eastern part and northeastern part of the lake at places unaffected by the overflow of the streams?

A. I always found that salt grass was on regular thin soil, next to the hardpan, or clay, or what they call it, and where the water does not stand the year round in places.

Q. In the earlier days, when you went in there, wasn't there a well-defined band, a wide band of salt grass on the southeastern part of the lake, and in parts other than those affected by the overflow of the rivers?

A. Yes; that was practically all of the vegetation on the southeast shore.

Q. How wide was that band, about?

A. Clear out to the greasewood, to the sagebrush on the southeast (R. 2543) side—that's all the grass there is out there.

Q. What is the fact about that rim growing apparently above the high water of the lake? Wasn't there a distinction between the high water of the lake where it seemed to be around the southeast and eastern part by virtue of that salt grass?

A. There might have been a little strip of wire grass next to this—salt grass and then there was wire grass—that could stand (R. 2544) water longer than the salt grass could.

Q. In other words, above the high-water point where the lake came in the springtime, you would have a small amount of wire grass that came up with the salt grass?

A. Yes.

Q. That was perfectly visible around that lake, wasn't it?

A. Yes.

Q. In the last ten years, we are getting a lot of salt grass over all that, aren't we?

A. Just practically all over the east of Pelican Island.

Q. Hasn't there been quite a change in the appearance of that southern and southeast part of the lake by reason of the last ten years of unusual water conditions?

A. Well, not a great deal of change until this drought took place there the last couple of years. That has made practically the only change.

Q. What is there in that change from your observation?

A. There is practically no vegetation at all except where the water goes in. (R. 2544.)

Recross-examination:

Mr. COLLINS. Q. With regard to this salt grass, that had no relation to the Neal meander line, had it?

A. No, I don't think so.

Q. There has been salt grass both sides of it?

A. Yes.

Q. Anywhere from 300 yards to a mile of it?

A. Yes.

Q. On each side of the lake?

A. Yes, all around it. (R. 2345.)

7. Field Notes of John H. Neal (Plaintiff's Exhibits 39–A to 39–K, Inclusive)

Mr. BLACKMAR. I desire to offer in evidence Exhibits 39–A to 39–K, inclusive, which are certified copies of the field notes returned by John H. Neal in pursuance to his contract 634, dated June 1st, 1895.

SPECIAL MASTER. Let them be admitted into evidence. They constitute the whole of his field notes?

Mr. BLACKMAR. Those constitute all the field notes of John H. Neal.

(Thereupon the said documents were by the reporter marked "Plaintiff's Exhibits 39–A to 39–K," inclusive.) (R. 2055.)

SPECIAL MASTER. That will be admitted into evidence. We can hereafter speak of 39–A to K, inclusive, as 39.

Mr. BLACKMAR. Yes. (R. 2056.)

a. Plaintiff's Exhibit 50, Index Map

Plaintiff's Exhibit 50, being an index map to field notes contained in Plaintiff's Exhibits 39–A to 39–K, inclusive, and Plaintiff's Exhibits 44–A to 44–P, inclusive, was admitted into evidence.

SPECIAL MASTER. An index map to be supplied by Mr. Pecore.

Mr. PECORE. There will be an index map and a diagram to substitute here in connection with that one on this larger scale.

SPECIAL MASTER. It is an index map and a diagram after the manner of (Plaintiff's) Exhibit 49, but larger.

Mr. PECORE. The index map is altogether a separate piece (R. 2345) of paper from the diagram.

SPECIAL MASTER. Let's have the diagram as Plaintiff's Exhibit 50, and your index map as Plaintiff's Exhibit 51. (R. 2346.)

8. Certified Copy of Plats Prepared by John H. Neal (Plaintiff's Exhibit No. 40)

Mr. BLACKMAR. I will offer in evidence (Plaintiff's) Exhibit No. 40, which are certified copies of the plats returned by John H. Neal in connection with his contract number 634, dated June 1st, 1895. These are the plats prepared in connection with the field notes, (Plaintiff's) Exhibits 39–A to 39–K, inclusive, and are a[illegible] the plats.

(Thereupon the said plats were by the reporter marked "Plaintiff's Exhibit 40.")

Mr. LILJEQVIST. For the record, if there is any misunderstanding, this 40, I understand, is the official certified copy of the official plat that is involved in this case.

Mr. BLACKMAR. Certified copies. (R. 2056.)

9. Case of Frank Cawlfield vs. D. A. Smyth and Claud H. Smyth

Mr. DARIUS HYNSON SMYTH, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I am the Mr. Smyth in the case of Cawlfield vs. Smyth. After that case was reversed by the Supreme Court and sent back, then I bought Mr. Cawlfield out, and I now own the deeded lands there involved. I also claim all the lands inside the (Neal) meander in front of the Cawlfield lands to the center of the lake. (R. 475.)

SPECIAL MASTER. I would like to have it noted in the record that the case of Cawlfield vs. Smyth, was reported in 69 Oregon 39, and in 138 Pacific 227; decided January 27th, 1914, Frank Cawlfield being the plaintiff, and the defendants being D. A. Smyth and Claude H. Smyth.

A. Claude H. Smyth wasn't in it.

SPECIAL MASTER. The Supreme Court of Oregon says he was.

A. He had no interest in it.

SPECIAL MASTER. Claude H. Smyth is your son?

A. He is my son. (R. 487.)

Mr. JEFF CAWLFIELD, called as a witness for the plaintiff, testified in substance as follows:

When my father moved over to the place my brother rented (R. 1885), I did not move over there with them.

I lived over there (on the south side of Malheur Lake); I owned a ranch over there, which I acquired in the fall (R. 1886) of 1900 (R. 1887).

I think it is known as the Smyth place now. I traded it to my brother (Frank Cawlfield) and he sold it to D. H. (Rye) Smyth.

SPECIAL MASTER. That was the property of which he was the owner in Cawlfield versus Smyth in 69 Oregon 41?

A. Yes. (R. 1886.)

SPECIAL MASTER. And it is described as certain fractional subdivisions of section 27 and 28, township 26 south, range 31 east, of the Willamette meridian. Is that where it is?

Mr. PECORE. Yes. The fractional subdivisions are lots 3 and 4, of section 27, and lot 4 of the section 28, T. 26 S., R. 31 E., south of Malheur Lake. (R. 1887.)

Cross-examination:

The place I had on the south side of the (Malheur) lake—(the D. H. (Rye) Smyth place) I sold to my brother, and he sold it to D. H. (Rye) Smyth. I think my brother (Frank Cawlfield) had

some litigation with D. H. (Rye) Smyth about that place. I lived on that (R. 1899) place before I sold it to my brother, I think in 1901.

I was not a witness in that case (Cawlfield vs. Smyth). (R. 1899.)

SPECIAL MASTER. The third case is called Cawlfield vs. Smyth, 69 Oregon 41, 138 Pacific 227, decided January 27th, 1914.

Now, in previous discussions mention was not made of the Colwell case, but I understand that counsel are to examine these records in the office of the clerk of the Supreme Court of the State of Oregon, and are to take such extracts from the records and briefs there as they may be advised as to the matters that bear upon the statements in the Springer case and in the Smyth case that Lake Malheur was a nonnavigable lake.

Mr. LILJEQVIST. Yes, sir.

(NOTE.—Offered in evidence as Defendant's Exhibit X-4.) (R. 2338.)

a. Defendant's Exhibit X-4

In the Supreme Court of the State of Oregon

Excerpts from the appellant's brief in the case of Frank Cawlfield vs. D. A. Smyth and Claud H. Smyth, respondents, the decision by the Supreme Court in which case is reported in 69 Ore. 41, 138 Pac. 227.

"If there was in fact a lake in front of appellant's land his upland extends to the common center of that lake."

Appellant's brief, page 29 (Oregon briefs Vo. 325, page 524).

"The meander line owner owns to a common center of a nonnavigable lake irrespective of whether the water disappears or not and independent of the causes or manner of the disappearance."

Appellant's brief, page 31 (Oregon briefs Vol. 325, page 525).

The entire brief filed by respondent in the foregoing case is as follows:

"In the Supreme Court—State of Oregon

FRANK CAWLFIELD, Appellant vs. D. H. SMYTH, Respondent

C. A. Sweek and L. R. Webster for appellant; Will R. King, for respondent.

BRIEF OF RESPONDENT

The questions involved present questions of fact only, and the instructions of the court correctly state the law applicable to the evidence presented at the trial.

French-Glen Live Stock Co. vs. Jenkins, 185 U. S. 54;

Security Land & Exploration Co. vs. Burns, 193 U. S. 171.

Moreover all the evidence being brought up on appeal an examination clearly discloses that as the verdict would not be different on a

retrial the judgment should under the authority delegated to the Supreme Court in Constitution of Oregon, Art. 7, Sec. 3 (as construed in 61 Or. 181; 61 Or. 410; 61 Or. 534; 61 Or. 592) be affirmed, regardless of any irregularities, if any, which possibly may have occurred at the trial.

WILL R. KING,
Attorney for Respondent."

STATE OF OREGON,
County of Marion, ss:

I, A. S. Benson, clerk of the Supreme Court of the State of Oregon, do hereby certify that I have compared the foregoing excerpts from the brief of appellant, Frank Colfield, filed with the clerk of the Supreme Court of the State of Oregon in the case of Frank Cawlfield vs. D. A. Smyth and Claud H. Smyth and the brief filed with the clerk of the Supreme Court by the respondent in said case, and do hereby certify that said excerpts are true and correct transcripts from the original brief of appellant and the entire original brief of respondent in said cause and the whole of said respective excerpts and the whole of said respondent's brief as the same appear on file and in my custody.

In witness whereof I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Oregon this 30th day of November, 1931.

ARTHUR S. BENSON,
Clerk of the Supreme Court of the State of Oregon.

[SEAL.]

b. Plaintiff's Exhibit 59—Complete Transcript of Record in case of Cawlfield v. Smyth

In the Supreme Court of the State of Oregon

March Term, 1913

FRANK CAWLFIELD, Appellant

vs.

D. A. SMYTH and CLAUD H. SMYTH, Respondents

APPELLANT'S BRIEF

Appeal from the Judgment of the Circuit Court for Harney County

STATEMENT OF THE CASE, PLEADINGS AND INSTRUCTIONS

It stands as agreed that the appellant is the owner of a tract of land bordering on the meander line of Malheur Lake in Harney County, that this meander line was duly and regularly fixed and established in 1895, and that the land in controversy lies within that

meander line and adjoins the land which it is conceded the appellant owns.

December 30, 1910, appellant began an action of ejectment for the recovery of the land within the meander line by filing the following

COMPLAINT

That plaintiff is the owner, in fee, of the following described lands situate and being in Harney County, Oregon, to-wit:

Commencing at a point 1,176 feet north of the northwest corner of lot 4 in section 28 in township 26 south, range 31 east of the Willamette meridian, south of Malheur Lake, running thence north 3,644 feet; thence south 82° 30′ E. 4,012 feet; thence south 3,600 feet; thence south 89° 25′ West, 4,012 feet to the place of beginning, and is entitled to the immediate possession of all said lands.

That defendants wrongfully withhold the same from plaintiff to his damage in the sum of five hundred dollars.

Wherefore, plaintiff demands judgment against defendants for the immediate possession of said lands, and for the sum of five hundred dollars damages, and the costs and disbursements of this action.

October 4, 1911, the respondent filed the following

ANSWER

Come now the defendants above named and for answer to the plaintiff's complaint herein, admit that the defendant D. H. Smyth is in the possession of the premises described in the complaint, but deny each and every other allegation thereof.

For a first, further, and separate answer to plaintiff's complaint, the defendants allege:

I

That the lands described in the complaint herein are unsurveyed public lands of the United States of America, and that the United States is the owner in fee simple thereof, subject only to the possession thereof by these defendants.

The case was tried to a jury, with verdict and judgment for the respondents.

At the proper time in the trial of the case the court gave to the jury the following instructions, to some of which exception was taken as herein shown.

INSTRUCTIONS

Gentlemen of the jury:

This is a civil action in which Frank Cawlfield is plaintiff and D. H. Smyth and Claud H. Smyth are defendants. In his complaint the plaintiff alleges that he is the owner in fee (and by owner in fee

he means the owner of the whole estate) of the following described lands, situated and being in Harney County, State of Oregon, to-wit: Commencing at a point 1,176 feet north of the northwest corner of lot 4 in section 28 in township 26, range 31 east of the Willamette meridian, south of Malheur Lake, running thence north 3,644; thence south 82° 30′ E. 4,012 feet; thence south 3,600 feet; thence south 89° 25′ W. 4,012 feet, to the place of beginning; and that he is entitled to the immediate possession of all of said lands; that defendants wrongfully withhold said lands from the plaintiff, to his damage in the sum of five hundred dollars; wherefore plaintiff demands judgment against the defendants for the immediate possession of said lands, and for the sum of five hundred dollars damage, and for the costs and disbursements of this action. The question of damages was waived by counsel at the commencement of the trial; so in any event the question of damage for the wrongful and unlawful detention of the property you will leave out of consideration, as they are not asking damages on the trial. To this complaint the defendants filed this answer: They admit that they are in possession of the premises described in the complaint, but deny each and every other allegation thereof; that is to say, in their answer they admit that the defendants are in possession, but deny the plaintiff is the owner in fee or otherwise of the property mentioned and described in the complaint and of which defendants are the occupants, or that the plaintiff is the owner of any part of it; and they deny that the defendants or either of them wrongfully or unlawfully withhold the same from plaintiff, which is equivalent to saying that the plaintiff is not under any circumstances entitled to the possession of it—possession of the property of which the defendants are in possession, or to any part of that property; then by way of further and separate answer to the complaint, the defendants allege that the lands described in Mr. Cawlfield's complaint, the paper I first read you, are unsurveyed public lands of the United States of America, and that the said United States is the owner in fee simple thereof, subject only to the possession thereof by these defendants; meaning that the defendants assert that they are entitled to the possession of the property claimed by the plaintiff, and to the whole thereof, as against the entire world, including the United States, but that—and that they are the owners thereof as against the entire world except the United States, in which the paramount title is.

The issue on this case, therefore, gentlemen, is this: Is the plaintiff entitled to the possession of the land which is now occupied by the defendants and which is described in this complaint, or is the plaintiff not entitled to that possession? As I will further instruct you, it is immaterial in this case whether the defendants own that land or are entitled to the possession of it. In this case the question, and the only question for you to determine is this: Not whether the defendants are or are not entitled to the possession of that land, but is the plaintiff entitled to the possession? If you find that he is, then your verdict will be for him. If you find that he is not entitled

to the possession of it, your verdict will be for the defendants, and it has no reference to the possession of the defendants, or right of the possession of the defendants to this property or any part thereof.

Gentlemen, in a case of this kind the court is obliged, unfortunately, to read you almost a thesis or a treatise on a law question. It is one that would tax the mind of an able lawyer to follow and to digest. It will not tax your minds any more than it would an able lawyer's to follow, but it might tax you a little more in order to digest these instructions; and as the justice of the trial and the rights of the parties depend upon you now, the necessity of your close attention to what the court now says with reference to the law which must bind you under your oath as jurors, is apparent. I know that at times the juror does not pay much attention to what the court says. He shouldn't be in the box. His inattention is to be condemned quite as much as would be a voluntary act on the part of the court in instructing the jury as to the law. It is quite as bad because it has the same effect in the result of the trial, perhaps, as would the voluntary act of the court in misdirecting the jury as to the law. So I ask you, gentlemen, in view of these facts, to give the closest possible attention to what the court instructs you, especially as the law of this case, which I shall endeavor to read slowly and as comprehensively as possible, will require your closest attention.

After having given that instruction, the Court then gave the following numbered instructions:

I

Gentlemen of the jury, I instruct you that this is an action in ejectment. In actions of this kind, in order that plaintiff may recover, he must do so on the strength of his own title. By "strength of his own title," I mean he must show by a preponderance of the evidence that he is the owner of the lands which he seeks to recover. To do this, he must prove such facts as, under the law which I now give you, shall disclose to your satisfaction that he is the owner thereof. It is necessary, therefore, that the preponderance of the evidence satisfies you that he is the actual owner of all the lands described in his complaint; and unless you are so convinced you must find for the defendants. By a preponderance of the evidence I mean that evidence which, in your judgment, is entitled to the greater weight.

II

I instruct you that if you find that at or near the time when the meander line was established by governmental survey in 1895, the meander line bounding plaintiff's entry on the north approximately reached the edge of the water of Malheur Lake, then such line was properly located; and I instruct you that the edge of a lake is the exterior line of its surface, where the same laps the surrounding land at the usual or ordinary stage of water in the lake.

III

I instruct you further that it is not necessary that the edge of Malheur Lake at or near such meander line should be constant and fixed, but that the same may vary to some extent during the different seasons of the year; and if you find that regularly, during periodical intervals of each ordinary year, and while the waters in said lake are at the usual or ordinary stage thereof, the waters of said lake would naturally be at or near such meander line, and that said meander line at the time of said survey in 1895 was approximately at the edge of said lake, and that the recession of the lake therefrom has been natural and gradual, then your verdict must be for the plaintiff, as to all land occupied by the defendants within the plaintiff's east and west line, extended to the edge of the lake, if such land be of inconsiderable extent.

To the giving of the foregoing instruction numbered 3, the plaintiff then and there objected on the ground that said instruction was not supported by the evidence, and was contrary to the law; which objection was overruled by the Court, to which ruling the plaintiff then and there excepted, which exception was allowed by the Court.

IV

I instruct you further that it is immaterial whether the water which reached the meander line as established by the survey of 1895, if it did reach that line, come from the river above or were backed up from the lake below, provided the water thus deposited and standing upon the land form a part or portion of what is known as Malheur Lake, and have a common level with it.

V

I instruct you further that the burden of proving that the meander line established in 1895 was incorrectly established is upon the defendants, and that the presumption is that it was correctly established.

VI

I instruct you further that it was not necessary that such meander line as established should, throughout its entire extent, have been coincident with the water's edge.

VII

I instruct you that as a general rule in establishing a meander line, the conditions of the country must be taken into consideration, and that in establishing such a line, it is usually impracticable to follow the exact sinuosities of the lake or body of water; and for

that reason a meander line is rather an approximation to the water's actual edge than an absolute portrayal thereof; and therefore, if you find from the evidence in this case that in some particulars the water's edge at the time of the survey of 1895 might have been at some distance from the meander then established, such meander line must be deemed as having been correctly established if it otherwise approximately shows the water's edge when the water is at its usual or ordinary stage.

VIII

I instruct you that the mere fact, if you find it to be a fact, that upon a part of the lands in controversy there has been annually cut from the native wild grasses growing thereon, crops of hay, this does not necessarily preclude the lands from being a portion of the actual lake bed; providing you further find that during the usual or ordinary stage of the water in said lake, such lands were, in 1895, a portion of the natural bed of Malheur Lake.

To the giving of foregoing instruction number 8, the plaintiff then and there objected on the ground that said instruction was not sustained by the evidence and is contrary to the law, which objection the court then and there overruled, to which ruling of the court the plaintiff then and there excepted, which exception was allowed by the court.

IX

If you find from the evidence that the lands in controversy exhibit upon their surface a number of swales or depressions in which at an ordinary or average stage of the lake, waters stand in such a way that they are connected with Malheur Lake proper, and have common level therewith, and that such depressions and the waters standing therein reach the meander line of 1895, and that this is their usual condition, even though they are not level throughout, then you should consider the lands in controversy to be a portion of the bed of Malheur Lake.

X

Lands which are overflowed from the body of Malheur Lake periodically, and which thereafter naturally dry up, and while in such dry condition afford opportunities from year to year for cutting hay are not such lands as are intended as swamp and overflowed land within the meaning of the act granting such lands to the State of Oregon, if that condition of overflow occurs every ordinary year; and if you find that the lands in controversy are thus periodically overflowed by the waters of Malheur Lake, and that the overflow decreases as the waters of said lake recede naturally and without artificial reclamation or drainage, and that such overflow waters are connected with and form a part of the waters of Malheur Lake, and have a common level therewith, and that at the usual or ordinary stage of water in said lake the lands so at times overflowed are dry,

and yield crops of wild grasses suitable for hay, then I instruct you that said overflowed lands, if this condition existed at the time of the survey, may not be deemed a part of the bed of Malheur Lake.

To the giving of the foregoing instruction number 10, the plaintiff objected on the ground that said instruction was contrary to the law, and was not sustained by the evidence; which objection was overruled by the Court, and to which ruling of the Court the plaintiff then and there excepted, which exception was allowed by the Court.

XI

Evidence has been introduced on the trial to the effect that ranchers have been diverting the waters of Silvies and Blitzen rivers during the irrigation season. If you find that the recession, if any, of the waters of Malheur Lake was caused yearly by diversion of the waters of said Silvies and Blitzen rivers, for irrigation purposes by ranchers, and not by natural causes, then I instruct you that such recession of the water and the consequent uncovering of lake shore land, if you find such to be the case, would not operate to invest the plaintiff as a riparian or shore owner with title to such uncovered land.

To the giving of the foregoing instruction number 11, the plaintiff objected on the ground that said instruction was contrary to the law, and was not sustained by the evidence; which objection was overruled by the Court, and to which ruling of the Court the plaintiff then and there excepted, which exception was allowed by the Court.

XII

The plaintiff has introduced in evidence here a patent from the United States to certain lands described therein. In addition to these lands it is claimed that a meander line was run along the northern boundary of lots 3 and 4, section 27, and lot 4, section 28, all in township 26 south of range 31, east of the Willamette meridian. I instruct you, gentlemen, that if you find a meander line or some line of survey was run along the northern boundary of the lands last described that is not conclusive evidence of the existence of a lake at that point. You will, therefore, weigh and consider all of the evidence in this case, and the fact, the conclusion, to be deduced from the whole evidence is to determine whether in fact there was a lake north of and adjoining the plaintiff's land described in his patent; and if there was not such lake at the time such meander line was run, to wit, in the year of 1895, you will find for the defendants; that is to say, I instruct you that before you can find for the plaintiff you must be satisfied from a preponderance of the evidence that during the year in which such meander line was run there was a lake immediately north of and adjoining the land described in plaintiff's patent as belonging to him; but if you believe from the evidence that there was a swamp or marsh instead of a

lake, immediately north of and adjoining said lands, then you will find for the defendants. In other words, it is a fact for you to determine whether there was a lake, if there was such lake at the said meander line, the plaintiff should recover, if the land uncovered by a recession of the lake, which said recession you find to have been natural and gradual, be not of such considerable area or amount as would increase his holdings and possessions under his patent to such an extent as would be unreasonable and beyond the possible intention of the Government in the execution of said patent.

To the giving of the foregoing instruction number 12, the plaintiff objected on the ground that said instruction was contrary to the law, and was not sustained by the evidence; which objection was overruled by the Court, and to which ruling of the Court the plaintiff then and there excepted, which exception was allowed by the Court.

XIII

The evidence in this case shows that the plaintiff was and is the owner of lots 3 and 4 in section 27, and lot 4, section 28, township 26 south of range 31, east of the Willamette meridian, having a patent thereto from the United States. His ownership of this particular property, when taken together with what purports to be a meander line, shown by the survey, the data or field notes of which are offered in evidence, taken alone is not sufficient to entitle him to recover; for in order that the plaintiff may recover in this action it must be shown by a preponderance of the evidence that on or about the date of such survey said lands were bounded on the north by the waters of Malheur Lake. And in this connection I instruct you that it is not sufficient to show that it was a marsh or a swamp or merely a temporary freshet or overflow, but it must appear it was a lake; and if you are not convinced by the preponderance of the evidence that it was a lake, and not a marsh or mere temporary overflow, then it becomes your duty to find for the defendants; otherwise, you should find for the plaintiff.

To the giving of the foregoing instruction number 13, the plaintiff objected on the ground that said instruction was contrary to the law, and was not sustained by the evidence; which objection was overruled by the Court, and to which ruling of the Court the plaintiff then and there excepted, which exception was allowed by the Court.

XIV

In order to constitute a lake within the meaning of the law, it must appear that the land involved during ordinary high water in ordinary seasons, and not during any exceptionally high water season, was covered by a considerable and permanent body of water to such depth as in your judgment may distinguish it from a mere overflow and disclose an indication of permanency to such an extent as to preclude the use of the lands covered thereby for farming purposes in the sense in which farming purposes are generally under-

stood in the vicinity in which such lands may be situated; and whether it was such a body of water is for you to determine after taking into consideration all the testimony adduced; and I instruct you that it is incumbent upon the plaintiff to have established by a preponderance of the evidence that such lake existed and abutted upon plaintiff's premises at or about the time of the survey by which the alleged meander line is claimed to have been established.

To the giving of the foregoing instruction number 14, the plaintiff objected on the ground that said instruction was contrary to the law, and was not sustained by the evidence; which objection was overruled by the Court, and to which ruling of the Court the plaintiff then and there excepted, which exception was allowed by the Court.

XV

I instruct you that in order to find for the plaintiff, you must be satisfied from a preponderance of the evidence that the lands or lots described in plaintiff's patent bordered on the meander line, and you must also be satisfied from such preponderance of the evidence that the waters have gradually receded and left such lands described in the complaint here in dispute, as accretions to such lots; that is to say, from which the waters have gradually and permanently receded from natural causes, so as to leave them in the condition in which they are now. However, if you find from the evidence that the recession of the waters of Malheur Lake have uncovered, between said meander line, which is the north boundary—which is at or near the original north boundary of plaintiff's premises, have uncovered, as I stated, a large area of land between the meander line and the present edge of Malheur—of the waters of Malheur Lake abutting—constituting the shore of said lake nearest the said meander line of the north side of plaintiff's premises, and that those areas are of large extent, consisting of hundreds of acres, then I instruct you that a recession of the waters of said lake from said meander line made in 1895, whether gradual and natural or otherwise, would not inure to the benefit of plaintiff, or entitle him to recover in this action.

To the giving of the foregoing instruction number 15, the plaintiff objected on the ground that said instruction was contrary to the law, and was not sustained by the evidence; which objection was overruled by the court, and to which ruling of the court the plaintiff then and there excepted, which exception was allowed by the court.

XVI

I further instruct you, gentlemen, that the fact that there may have been a meander line along the northern boundary of plaintiff's patented lots is not conclusive evidence of the existence of a lake. You will, therefore, weigh and consider all of the evidence in this case, and from the whole evidence determine the fact as to whether or not there was in reality a lake north of and adjoining said lands; and

in this connection I instruct you that if you find that there is a body of land between plaintiff's lots described in his patent and that of the defendants', which was not such lake, you will find for the defendant; and especially if you find that the lands claimed by D. H. Smyth, one of the defendants, or by the defendants, as the case may be, was not such lake, it then becomes your duty to find for the defendants. That is to say, I instruct you that before you can find for the plaintiff you must be satisfied from a preponderance of the evidence that there was a lake immediately north of and adjoining the lots and lands described in plaintiff's patent; but if you believe from the evidence that there was a swamp or marsh immediately north of and adjoining said lands when the 1895 meander line was run, then I instruct you that it becomes your duty to find for defendants. In other words, it is a fact for you to determine whether or not there was a lake adjacent to and immediately north of plaintiff's said lands.

To the giving of the foregoing instruction number 16, the plaintiff objected on the ground that said instruction was contrary to the law, and was not sustained by the evidence; which objection was overruled by the court, and to which ruling of the court the plaintiff then and there excepted, which exception was allowed by the court.

XVII

I further instruct you, gentlemen, that if you find that a large body of land bordering on Malheur Lake was erroneously omitted or nor included in the survey of the meander line, that a conveyance by the United States of a definite number of acres of land bounded by such meander line, would not convey any portion of said land so omitted or not included in the survey of said meander line.

XVIII

I instruct you further, that lands which are periodically overflowed and only overflow periodically from year to year, and such overflow does not ordinarily interfere with the growing of such agricultural crops as farmers in the vicinity thereof are accustomed to raise, and harvest, that such overflows taken alone, and without any indication of permanency, if you find such to be the case, would not constitute a lake within the meaning of the law. And if you find that the lands in controversy are thus periodically overflowed and that the inundated or watered conditioned thereof is only caused thereby, then I instruct you to find for the defendants.

To the giving of the foregoing instruction number 18, the plaintiff objected on the ground that said instruction was contrary to the law, and was not sustained by the evidence; which objection was overruled by the court, and to which ruling of the court the plaintiff then and there excepted, which exception was allowed by the court.

XIX

I further instruct you, gentlemen, that it can make no difference so far as the issues involved in this case are concerned, whether the defendants or both of them or either of them have or has any title on or to the lands in controversy in themselves, or any right to procure title therein, if it appears they are in possession; and it can make no difference whether as between the defendants or either of the defendants and the Government such possession may be held rightfully or wrongfully, for the reason that it is incumbent on the plaintiff to show by a preponderance of the evidence, as I have stated, that he is the owner of the lands in question, and entitled to the possession thereof. Both of these elements must exist: he must not only be the owner, but at the same time must be entitled to the immediate possession of the land described in the complaint; and if it should appear from the evidence that the title to such lands is in the Government, it is not for you to inquire as to who has the better right, whether it may be the Government or the defendants, or either thereof, to such lands. The question for you to determine by a preponderance of the evidence is: Does the plaintiff have such right? If not, then you will find for the defendants.

After having given the foregoing instructions the court gave the following:

The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in this case. You are the exclusive judges of all questions of fact which you must decide, and of all evidence thereon which has been addressed to you. You are also the exclusive judges of the credibility of all the witnesses. Your power of judging of the effect of evidence is not arbitrary, however, but is to be exercised with legal discretion, and in subordination to the rules of evidence.

A witness is presumed to speak the truth; this presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds as against a less number that does; or against a presumption of law or other evidence, satisfying your minds. If a witness in this case is found to have sworn falsely in any material part of his testimony, he is to be distrusted in all others; and if any witness in this case is found to have sworn wilfully falsely in any material part of his testimony, you should distrust the entire testimony of such witness, except in so far as it may be corroborated by other evidence which you do believe.

This being a civil case it is not necessary, gentlemen, or essential, that your verdict should be unanimous, upon retiring you will select and elect one of your number as foreman, and when you have agreed upon your verdict, two forms of which will be submitted to you,

one finding for the plaintiff and the other for the defendants, if your verdict is unanimous, have it signed by your foreman. However, a verdict which is not unanimous, but which is signed by nine of your number, will be a good verdict, and will support a judgment. In criminal cases your verdicts must be unanimous, and signed only by the foreman; in civil cases a verdict signed by nine of the twelve jurors makes a good verdict.

After the jury had retired and been in deliberation for some considerable time they returned into Court and asked if the Court would especially instruct them with reference to the amount of land that the plaintiff might recover, and what bearing on the case, the amount of land in question would have; whereupon and in reply to such special request the Court gave the following instructions.

With reference to the amount of land that the plaintiff—a plaintiff in proceedings of this kind might claim by virtue of the fact that his holdings are separated from the lake by means of a meander line, I instruct you that a meander line should mark the shore line of abutting property, if such line is properly surveyed. If it does not mark such line practically, it is not a true meander line, and should be disregarded. It is not necessary that this line shall coincide with the edge of the lake by following the true curvature of the shore line. It may consist of broken straight lines, and is to control if it is so located as not to leave a considerable body of land between the said meander line and the water's edge when the lake is at its usual or ordinary state. So in this case, if the meander line of 1895 fairly marks the shore line of the lake at that time, it would be controlling here, and the plaintiff must recover, unless the recission of the waters from the original shore line of the lake as shown by that survey has been so great as to add a very considerable quantity of land, amounting to as much or more land as that described in the patent which the plaintiff obtained from the Government, in which latter case the meander line must be regarded as his north boundary, and he can not recover here in such case.

To the giving of which instructions the plaintiff then and there objected, upon the ground that said instruction was contrary to the law and was not supported by the evidence; which objection was then and there overruled, to which ruling of the Court the plaintiff then and there excepted.

At the proper time in the trial the appellant requested the Court to give to the jury the following instructions, which request was refused by the Court and exceptions reserved.

INSTRUCTIONS ASKED AND REFUSED

I

I instruct you that if you find that at or near the time when the meander line was established by governmental survey, the meander line bounding plaintiff's entry on the north, approximates the water's edge of Malheur Lake, then your verdict must be for the plaintiff.

The Court refused to give such instruction, to which refusal of the Court the plaintiff then and there excepted, which exception was allowed by the Court.

The plaintiff also requested the Court to give to the jury the following instruction:

II

I instruct you further that it is not necessary that the water's edge of Malheur Lake at or near such meander line should be constant, but that the same may vary during the different seasons of the year; and if you find that regularly, during periodical intervals of each year, the waters from Malheur Lake would then reach approximately such meander line, then your verdict must be for the plaintiff.

The Court refused to give such instruction, to which refusal of the Court the plaintiff then and there excepted.

The plaintiff also requested the Court to give to the jury the following instruction:

VII

I instruct you that the mere fact, if you find it to be a fact that upon the lands in controversy there have been, for a small area, annually cut from the native wild grasses growing thereon valuable crops of hay, this does not necessarily preclude the lands from being a portion of the annual lake bed; providing you further find that during the high water stage every year such lands are to a considerable extent covered by the waters from Malheur Lake.

The Court refused to give such instruction, to which refusal of the Court the plaintiff then and there excepted, which exception was allowed by the Court.

The appellant presents the following

PROPOSITION OF LAW

Where a lake is meandered by the public survey the lake and not the meander line is the true boundary of the riparian owner.

French-Glenn Live Stock Co. v. Springer, 35 Or. 312; 185 U. S. 47; 12 Sup. Rep. 563.
Johnson v. Tomlinson, 41 Or. 200.
Sun Dial Ranch v. May Land Co., 61 Or. 216.

The errors relied upon consist in the propositions of law as expressed in instructions and that the evidence is not sufficient to sustain the verdict.

ARGUMENT

The case presents itself almost in a nutshell, as it were. The proposition of law above presented is the law of this State and the law as declared by the Supreme Court of the United States no matter

what other courts may have decided. The closing paragraph of the opinion of the Supreme Court of the United States in the Springer case is the final word on this subject. "We think," says the court, "that, while, if there was a lake abutting on or to the north of the lots, the plaintiff in error would take all land between the meander line and the water, and all accretions, it was competent for the defendant to show that there was not, at the time of the survey or since, any such lake, and to contend that, in such a state of facts there could be no intervening land and no accretion by retraction."

In the Springer case the question of the existence of a lake in front of the property was submitted to the jury and they decided that there was no such lake. In this case the court in its instructions submits two questions, each of which are directly concluded from consideration by the unquestioned law, namely, first, was the meander line correctly established, and second, was the recession of the water gradual or sudden?

The first meander line of this lake was established in 1877. In 1895, another was run and that is the one involved in this case. If there was in fact a lake in front of appellant's land his upland extends to the common center of that lake. Neither the jury nor the court can correct that meander line, much less disregard it. The right of appellant to the land between the water of the lake and his meander line does not depend upon whether the jury may think that such land is "of inconsiderable extent" (whatever that may mean) as declared in instruction number three and elsewhere throughout the instructions. But even worse than that, if anything could be worse, is the instruction repeated and reiterated over and over again that even if the water of the lake actually washed every inch of appellant's meander line when that line was established and if, since then, the water has receded, leaving dry a part of the lake bed, the appellant has no right to that land unless "the recession of the lake therefrom has been natural and gradual" (Instruction No. 3). Just what is meant by "natural and gradual" we are not advised. A cyclone or an earthquake is just as natural as the blooming of a lily or the song of the lark, but if an earthquake opened a hole in the bottom of the lake and let the water all out at once the theory of the law, as expressed in these instructions would prohibit appellant from having any of that land thus uncovered. But, an earthquake being natural, if it should open but a small hole in the bottom of the lake so that the water would leak out slowly enough to satisfy the jury's idea of gradualness, then the appellant would own the land. His ownership of the land depends upon the extent of the leakage. But, if we have no direct instructions as to what naturalness is, the court in instruction number 11, made some approach to certainty by declaring one thing which it is not. Taking water for irrigation out of the streams which supply the lake and thereby reducing its level is not a natural cause, says the court. Now, man in a material sense (the sense in which he irrigates—or rather, the sense in which he practices irrigation) is but one of the

activities of nature, and if he diverts water from a stream with a shovel why is not that just as natural as though it were done by nature working through a ground hog or a beaver or a cyclone?

The final word of the court to the jury, in answer to a request for additional instructions, was this: "So in this case, if the meander line of 1895 fairly marked the shore line of the lake at that time, it would be controlling here, and the plaintiff must recover, unless the recession of the waters from the original shore line of the lake as shown by that survey has been so great as to add a very considerable quantity of land, amounting to as much or more land as that described in the patent which the plaintiff obtained from the Government, in which latter case the meander line must be regarded as his north boundary, and he can not recover here in such case."

The Supreme Court of the United States says that "if there was a lake abutting on or to the north (or south) of the lots the plaintiff in error would take all land between the meander line and the water and all accretions." The meander line owner owns to a common center of a nonnavigable lake irrespective of whether the water disappears or not and independent of the causes or manner of the disappearance.

It is submitted that this case should be reversed with direction of judgment for the appellant.

C. A. Sweek,
Emmons & Webster,
Attorneys for Appellant.

In the Supreme Court, State of Oregon

Frank Cawlfield, appellant
vs.
D. H. Smyth, respondent

C. A. Sweek and L. R. Webster for Appellant; Will R. King, for Respondent.

Brief of Respondent

The questions involved present questions of fact only, and the instructions of the court correctly state the law applicable to the evidence presented at the trial.

French Glen Live Stock Co. *vs.* Jenkins 185 U. S. 54;
Security Land & Exploration Co. *v.* Burns, 193 U. S. 171.

Moreover all the evidence being brought up on appeal an examination clearly discloses that as the verdict would not be different on a retrial the judgment should under the authority delegated to the Supreme Court in Constitution of Oregon Art. 7, Sec. 3 (as construed in 61 Or. 181; 61 Or. 410; 61 Or. 534; 61 Or. 592) be affirmed, regardless of any irregularities, if any, which possibly may have occurred at the trial.

Will R. King,
Attorney for Respondent.

10. Letter of General Land Office relative to papers concerning examination of Neal Survey; Defendant's Exhibit X–10

DEFENDANT'S EXHIBIT X–10

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, Aug. 20, 1931.

In reply please refer to 1427614 "E" WTP
In re papers relating to surveys around Malheur Lake, Oregon.

Hon. I. H. VAN WINKLE,
Attorney General, Salem, Oregon.

MY DEAR SIR: Reference is made to your letter dated August 11, 1931, relative to the report of Henry W. Newby, Special Agent, upon his examination of the surveys around Malheur Lake, Oregon, as executed by John H. Neal, D. S., under his contract No. 634, dated June 1, 1895.

You are advised that Mr. Newby's letter dated June 9, 1897, appears to have been received in this office June 10, 1897—letter No. 54572—in which he states that he transmits his notes and report on said contract; also a set of photographs of the surroundings of the lake which were furnished him by Mr. C. A. Haines, of Narrows, Oregon, and a skeleton map of the country; there appear to have been nine inclosures received with said letter.

It further appears that in letter "E" dated June 24, 1897, addressed to the Surveyor General for Oregon, accepting the survey executed by Deputy Neal, reference was made to the receipt of said report and it was stated that the same bore evidence that the survey was executed as set forth in the deputy's return.

A protracted search, however, fails to reveal the report or the other matters referred to in said letter. I regret to state, therefore, that it will be impossible to furnish you with the copies thereof which you desire.

Very respectfully,

(Signed) D. K. PARROTT,
Acting Assistant Commissioner

D. MALHEUR LAKE

EVIDENCE RELATING TO

1. Elevations

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

The lowest elevation in Malheur Lake that I found I now indicate in blue pencil to identify it at this point on Plaintiff's Exhibit

No. 3, about ten inches on the map south of section 23, T. 25 S., R. 32½ E., the elevation being 4,088.8 feet. It is indicated on the map as 88.8. (R. 85.)

The two areas of the old lake bed at an elevation of 4,089 feet embraces about 60 acres in the one piece, and a smaller one in the channel at the Narrows below the 4,089 feet contour contains about 16 acres. (R. 87.)

Cross-examination:

The slight raises above elevation 4,093 feet on the southerly half of the west part of Malheur Lake are very small as compared with those on the northerly side. (R. 2262.)

a. Areas

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

The two areas of the old lake bed at an elevation of 4,089 feet embraces about 60 acres in the one piece, which I will indicate with a blue pencil on Plaintiff's Exhibit No. 3, about ten inches on the map south of section 23, T. 25 S., R. 32½ E.; and a smaller one in the channel at the Narrows below the 4,089 feet contour contains about 16 acres. (R. 87.)

aa. Above water

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I have not computed the amount of land that would be above water when it is at elevation 4,094 feet, but it would be very much less than if the water was at 4,093 feet.

The west part of Malheur Lake would not be all under water if the water was at elevation 4,095 feet. (R. 2261.) I believe there would be several hundred acres of land above the elevation of 4,095 feet. (R. 2262.)

b. Water Gages

Mr. JOHN EMERY GRAVES, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

There was a water gage, or lake gage maintained on my place; I think that is what you would call it, or a Government gage.

Mr. PECORE. It is shown on that map.

Mr. LILJEQVIST. Yes.

Q. Now, on this map, Plaintiff's Exhibit 3, immediately below the wording "Gauge"—it is in lot 6, of section 2, township 26 south, range 32 east, north of the lake—there is marked on this place a water gage, elevation 4,091.16; do you remember (R. 2113) that gage?

Mr. PECORE. The map apparently fails to indicate the exact position. In looking at that I can't tell whether that gage is this way or that way, or above or below.

There were not two (water) gages around my barn. There was one right near the barn, which I believe Mr. Dodge put in. I could not tell you what year it was put in without looking it up on the memorandum that I kept for him. I read that gage for quite a long time. I could not say whether that was a gage of the lake itself; I suppose it was, though.

The backwater of the lake went onto that gage so that I could read it. (R. 2114.)

I think I read that gage once a day for a while, and then maybe twice. I sent my reports to Mr. McCall. I do not know where they ultimately got to.

Mr. LILJEQVIST. Q. Can you state of your own independent (R. 2115) recollection where that gage was situated? Was it in a depression or on the level land, or where was it?

A. Well, it wasn't on a knoll. I would say they were both practically on the level, as near as you could get it in the country.

One of the gages was located over near the Neal meander line, and the other was above it. I read both of them.

Mr. LILJEQVIST. Q. Now, let us take the one near the Neal line. What is your recollection as to where the water stood on the gage?

A. I couldn't say as to that. I just put it down in a book, and turned it over to him.

I turned that book over to him.

I read the gage in the springtime, when the water was at the highest; (R. 2115) I must have read it about two months, something like that. I just read it for one year; that is all; I didn't read it after that because they wouldn't pay me any more.

Mr. LILJEQVIST. Was there a certain mark on that gage at all? Was there a bench mark by it?

A. Well, I couldn't say as to that. There were some marks there, and Mr. Dodge could tell about them, I think, more than I could.

Q. And your reports were made in writing, and sent in for a period of one year, anyway?

A. It wasn't that long.

Q. During a portion of a year?

SPECIAL MASTER. Within one year?

A. Within one year. (R. 2116.)

I think I remember when Mr. Dodge set those gages. (R. 2122.)

Redirect examination:

Mr. BLACKMAR. In connection with Mr. Graves' testimony, I want the record to show that (Plaintiff's) Exhibit 3 shows that the elevation of the gage at the barn is 4,090 feet.

Mr. PECORE. 4,090.66.

Mr. BLACKMAR. 4,090.66?

Mr. PECORE. Yes. (R. 2125.)

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

We checked up some of the water gages around Malheur Lake where they had been established. (R. 2266.)

There are two water gages northeast of section 25, T. 26 S., R. 31 E. south of the lake. The elevation of the Benson or Biological Survey gage is 4,089.79. The elevation of the other one, known to us as the Geological Survey gage in the immediate vicinity of the Benson gage, is 4,090.42. Those elevations are as nearly as we could determine the elevations in feet of the zero mark on the gages. There are two gages in the vicinity of Doc. Graves' place north of Malheur Lake. One of them is in section 35, T. 25 S., R. 32 E., north of the lake, with an elevation of 4,090.66.

There is evidence of an old gage over on the peninsula north of Pelican Island in section 20, T. 25 S., R. 33 E. (R. 2267), but the position of the zero mark on that gage could not be determined at that time; we would have had to guess it. (R. 2268.)

c. Establishment of Water Gages in 1922, by M. V. Dodge

Mr. MOTT V. DODGE, called as a witness for the defendant, testified in substance as follows:

In the early spring of 1922 I received a letter from Mr. R. D. Cooper, who was then in Salem, asking me to establish certain gages on Malheur Lake, and I proceeded to do so. (R. 2372.)

I established one gage at Pelican Island, that is near where the peninsula of Pelican Point leaves the mainland.

I established another gage at Doc. Graves' place.

I established another one at Benson's cabin, near the mouth of the Blitzen River.

I think that is all the gages that I established at that time.

I can not be sure of whether the purpose of establishing those gages was to get the water levels of the lake, or the river, as I do not believe I engaged a man to read them. I established them, and that is about all I did at that time.

I do not believe that I know for what purpose it was desired to secure those gage levels.

At the time Mr. Cooper asked me to establish those gages I think he was working as an assistant to the State Engineer of Oregon. (R. 2373.)

I carried out my instructions (in the matter).

I do not know of my own knowledge whether reports were made or to whom.

I believe those gages were established in 1922.

Mr. LILJEQVIST. Q. Now, will you state whether or not (R. 2374) you assisted Mr. Cooper in making a report to the State Engineer of the State of Oregon, or did he make out the report himself?

A. That was his own work.

Q. That was his own work. And do you know what personal checking he had, or whether he got the information from you? In making out his report, do you remember what he did?

A. No, I don't. (R. 2374.)

aa. Hydrograph in Defendant's Exhibit X–1

Mr. R. D. Cooper, called as a witness for the defendant, testified in substance as follows:

Mr. Liljeqvist. The only thing we did not have in (Defendant's) Exhibit X–1 is the blue print which is attached to it, and which I wish to ask him about.

Q. Attached to the original, and a copy of which is not attached to X–1, there is a hydrograph of Malheur Lake water surface elevation in 1922. Will you state if you prepared that?

A. Yes.

I prepared it from actual water surface elevations taken during the period of several months in 1922. It was taken from readings of the gages that Mr. Dodge testified as being set earlier in the spring. One or two of those gages may have been possibly influenced by its proximity to the river inflow.

On this blue-print graph just referred to (attached to Defendant's Exhibit X–1) it shows the water elevations at six different stations on Malheur Lake from the summer of 1922, one gage being the Biological Survey gage. It is north of the mouth of the Blitzen River, and I believe you have a reference here to George Benson's cabin. It would be in the vicinity of that point. (R. 2409.)

Mr. Liljeqvist. The gage near George Benson's cabin, is that the gage which is marked on your exhibit "Bench mark elevation," or where is that gage?

Mr. Pecore. Oh, it is up here, or here [indicating]. This is a Biological Survey gage, and was established, I believe, by Mr. Benson, and this is the Geological Survey gage, and I don't know that either of them is the gage Mr. Dodge is referring to. It may or may not be. (R. 2410.)

Mr. Liljeqvist. Is that mark on this map right above the grain field, just about the mouth of the Blitzen, is that the U. S. Geological gage which shows 4,090.2?

Mr. Pecore. Yes, sir.

Mr. Liljeqvist. Is that the same elevation shown in your record?

A. I have the zero gage marked 4,090.2. (R. 2410.)

(Note.—Mr. Liljeqvist is to furnish a copy of the blue print—the hydrograph, which is to be attached to Defendant's Exhibit X–1. R. 2410–2411. This has been supplied.).

Mr. Liljeqvist. With reference to that gage mark, will you state the highest point on that gage that the water raised that year in the summer months?

A. About the middle of May.

SPECIAL MASTER. The highest point?

A. The highest point on this graph shows an elevation of 94.5 feet; approximately that same water level continuing well into June.

There was another gage near the mouth of the Blitzen River, but I do not have the details of that location well enough to give you any further data on the actual location.

Another gage was located near Pelican Point, at the east end of the (Malheur) lake.

Another one is at the Showen bridge, just near the mouth of the Silvies River. (R. 2410.)

There is another gage on the north side of the lake near the Graves ranch, toward the (Malheur) lake from Graves' residence.

I also have a record of the reading on the gage at the Narrows bridge.

The highest point that the water raised on the (Malheur) lake, as shown on the gage near Pelican Point (R. 2411) is about 94.5. I say "about," because I am unable to read this graph to hundredths.

Mr. LILJEQVIST. Q. All right. Now, on the Showen bridge.

A. The Showen bridge, shortly after the middle of May, about the 17th, this record shows the water surface elevation of 94.7.

Q. And the Graves ranch?

A. The highest point there is the latter week in May, 94.5.

Q. Down at the Narrows, how high did the water get in the gage elevation?

A. 94.1.

Those elevations are based on the supposition that the Geological Survey bench mark near the Narrows bridge is elevation 4096.20, I believe.

SPECIAL MASTER. Well, it is 96.20 as against 93.868, isn't it?

Mr. PECORE. 95.868.

SPECIAL MASTER. 95.868.

Mr. LILJEQVIST. In other words, the same thing. I expect they will concede if you take three-tenths off this gage of Mr. Cooper's record, it will produce the height of the water according to the Government bench marks and figures.

SPECIAL MASTER. His bench mark and Mr. Dodge's are the same? (R. 2412.)

Mr. LILJEQVIST. Yes.

The WITNESS. I would like to add just a word in connection with the testimony that I have given from this blue printed graph. One of the reasons that this work was done was to determine whether or not the gage reading and any particular point was representative of the entire (Malheur) lake, and this graph shows that the lake is not necessarily of uniform elevation. That is due to two or three different reasons.

Q. What is the difference between the highest point you have given and the lowest point at the Narrows?

A. You asked for the highest point at all stations, and I have given you the highest point; but the highest points do not check on the different gages. They are not equal.

The record gives the distinctions, and it is all explained in the graph (attached to Defendant's Exhibit X–1).

Mr. LILJEQVIST. Q. Do you know whether that result is affected at all by the slowness of the water going out through the tule area in the west part of the lake? In other words, does the west part of the lake to some extent act as a dam?

A. I don't believe that there is any particular authority on that. My opinion has always been that the tules retarded the flow of the water so that the lake was not necessarily level at all times. (R. 2413.)

Possibly a gage in this list that was set near the influence of incoming waters from the rivers would read slightly higher than a gage read the same day on open waters remote from the incoming flow. (R. 2414.)

Q. Now, the purpose of getting those gages: Was it to determine the height of a dike that would have to be constructed if the Government and State got together on the matter, do you know?

A. The reason that the State Engineer authorized this brief or short preliminary survey was because the question had come up several times in the State Engineer's Office regarding the level of Malheur Lake, and simply to be more or less prepared with a little data and some bench marks to refer the lake to later, the State Engineer asked me to set some benches and establish some gages and keep this record, and a part of the work was done by Mr. Dodge, as he has already testified.

Q. Have you any way of determining from your subsequent study of the gages and the bench marks where the water level was in Malheur Lake with reference to these same bench marks when you made this survey which has been projected upon the plat, Defendant's Exhibit X–6? (R. 2414.)

SPECIAL MASTER. Are they eight years apart, the map and the report?

Mr. LILJEQVIST. Yes.

SPECIAL MASTER. 1914 and 1922?

Mr. LILJEQVIST. Yes, sir.

The WITNESS. I never studied any particular relation between the two jobs.

Q. Do you know whether the water came back subsequent to 1922 to the height it reached in 1922?

A. No; I have no knowledge of that.

Q. You have no knowledge. Let me put the question this (R. 2415) way, Mr. Cooper: If the mean height of the Neal meander is 4,093, according to the Government records, which is three-tenths of a foot below the State records, is it your judgment that the water came back in 1922 to the Neal line, or to that elevation?

SPECIAL MASTER. Do you know anything about that, Mr. Cooper?

A. I don't. I didn't relate the elevations to the Neal line.

Mr. LILJEQVIST. All right.

The WITNESS. I am not familiar with the Neal elevations.

Q. I may put it this way: If your elevation came back to 4,094, and you take three-tenths of it off from that, and the Government's mean elevation is 4,093, would the water in 1922 come at least as high as 4,093, the Government elevation? (R. 2415.)

A. I don't get this 4,093——

Q. 4,093 feet above sea level, that is the Government's.

A. That is the whole number you are reading?

Q. Yes; 4,093. I am using just "93."

A. I see.

SPECIAL MASTER. Are you asking the stage of the water at the time Mr. Cooper and Mr. Dodge worked there in 1922?

Mr. LILJEQVIST. In 1922.

SPECIAL MASTER. Later, or before they were there?

Mr. LILJEQVIST. In 1922 when Mr. Cooper made up this report. The record in 1922. What I am trying to get at, your Honor, is, I wish to establish whether or not the waters in 1922 came back to the Neal line. (R. 2416.)

SPECIAL MASTER. As I understand it, Mr. Cooper doesn't know anything about that. He went down there and operated in January and February, in 1922, and found certain conditions and reports then. What the condition was before, or what it has been since, he doesn't know.

Is that true, Mr. Cooper?

A. Yes, that is true. I haven't correlated the 1922 work with the work which I helped to do in 1914, and off-hand I would be unable to give you definite relations between those two pieces of work. If I could refer to my notes for quite some little time I could follow an equation through.

Mr. LILJEQVIST. Q. Well, the points you have given as shown in the graph and shown in the report are the records of the run-off at the (R. 2416) level of the lake the best you could obtain them for the year 1922, is that correct?

A. Yes.

Mr. LILJEQVIST. I think that explains itself. I think that is all. (R. 2417.)

d. Benson's Water Gage

Mr. GEORGE M. BENSON, called as a witness for the defendant, testified in substance as follows:

I did not keep any record of the wet and dry seasons, or of the rainfall since I have been on Malheur Lake as supervisor. The only record I kept with reference to the water on the lake was at the gage, which is shown on the map, Plaintiff's Exhibit 3, about three inches northeasterly of my cabin, and is indicated "Benson's Gage, Elevation 4,089.79." I put that gage in there, and it was placed in the

waters of the lake. In putting that gage in there, I first went out (in the lake) where the water was (R. 2518) a couple of miles in a little northeasterly direction from the Blitzen River (R. 2522) and ran a stick down to a reasonable distance in the mud two or three inches I should (R. 2519) judge, and then I measured that distance and then I came back and drove this pipe down, and ran this gage down to that place (R. 2520); I drove the pipe down into the mud up to a certain elevation; this pipe was marked half inches and inches. I had a zero mark on it that was down in the water. I could not tell you where the zero mark on the gage was with reference to the bottom of the lake; the zero was down in the soft mud (R. 2518).

I have produced here a paper, in tabulated form, from June 5, 1921, to March 13, 1931, marked "Gage Readings by Mr. Benson," which are correct copies from the original records. Those readings I sent to the Biological Survey. The record that I kept was on my day and weekly report; at the end of each week I report the daily happenings and then on the bottom where it says "Remarks," I usually put the (R. 2519) lake level there and give it in the number of feet and inches.

Mr. LILJEQVIST. Q. This record that you have gives the date, and says "Gage Readings," "Feet and Inches." When you wrote "4" under "Gage Feet" and "7" under "Readings Inches," as of June 5, 1931, what did you mean; what did you see?

A. On that pipe it was marked from one foot up to six feet.

Q. Your gage was made in inches and feet, was it?

A. Yes.

Q. And zero was some place in the mud?

A. Yes.

Q. Can you tell me now how far zero was underneath the mud?

A. I don't know what the first one was there.

(Mr. Liljeqvist hands report to Mr. Benson.)

A. (Continuing.) I could not tell where it was because the way I got at the water level, I went out into the lake and run a stick down to a reasonable distance in the mud, two or three inches I should judge, and then I measured that distance, and then I came back and drove this pipe down, and run this gage down to that place.

I do not know how much mud there was there—a foot and a half. I had to drive this gage way down into the mud.

I had the zero marked on the pipe something like about three feet above the end of the pipe; then I drove the pipe down into the mud and ground until I got the zero to about as much as I had measured out into the lake (R. 1520) with the stick I have already described (R. 2519–2520). I do not know how far below the surface of the mud my zero would be. The way I set the thing is supposed to be right on the hard part of the lake bottom. A lot of that soft stuff (mud) (R. 2520) has whirled in four or five inches after I set the gage. That gage was not in the water at all when it (Malheur

Lake) is dried up. There has always been water there every year right near. (R. 2520.)

The gage was in the (Malheur) Lake proper.

Mr. LILJEQVIST. Q. That gage was with about three feet of pipe below the zero mark wasn't it, and about six feet of pipe above the zero mark?

A. Started at one and went up to six feet.

Q. There are three feet of pipe below the zero mark?

A. Yes.

Q. You drove that pipe down into the ground until you got it into the mud?

A. Yes.

Q. I want your best judgment as to how far below the top of that mud the zero mark was.

A. As near as I remember, I was out on the lake and I measured the water out there (with a stick as I have described), and then I came back and put that end of the pipe on the zero and then went up here [indicating] on the pipe and got that on the level where the water would come to. I don't know whether it was in the water three inches or a foot, but this top was supposed to be the measurement of the water out in the lake.

Q. As I understand you, you went out into the (Malheur) lake and tried to find the water level of the lake and measured it, and then you went in to where you set the gage and drove—and put it down to the same mark that you got out in the lake?

A. Yes.

Q. Where did you place zero on your pipe with reference to the mark you had in the lake? (R. 2521.)

A. It would be 4 feet 7 inches there. I did not get any level at all of that zero from any other point. (R. 2521.)

Q. When you drove your pipe, you had some water at that place at that time, didn't you?

A. Yes; lots of water.

Q. And you drove it down until you found the same water mark on the pipe that you found farther out in the lake?

A. Yes.

Q. That water line there that you drove it to, where was that line with reference to zero as was placed on the gage—that's what I can not understand.

A. It would be 4 feet 7 inches above the zero.

Q. How far out from where you put this gage did you go out to determine this mark?

A. A couple of miles.

Mr. COLLINS. In which direction?

A. A little northeast from the Blitzen (River).

Q. Benson's gage elevation 4,089.79, shown on Plaintiff's Exhibit 3, is that the zero of your gage?

Mr. COLLINS. Wait a minute—he can not answer that. (Counsel consult Jessup's Report.)

Mr. LILJEQVIST. Q. These readings that you have made out from your record is the number of feet and inches above zero that the water level came to?

A. Yes.

Q. This is a true copy of your original report?

A. I think it is.

Q. This data was turned over to Jessup or Pecore?

A. Both of them I think had the use of it. (R. 2522.)

Mr. LILJEQVIST. I will offer these in evidence.

(Gage Readings Report of Mr. Benson is marked Defendant's Exhibit X–8.)

Mr. LILJEQVIST. Q. Mr. Jessup and Mr. Pecore have both taken the zero of your present gage in their surveys?

A. I don't know that they have.

Q. You gave them this data that is in this exhibit?

A. Yes.

Q. From Jessup's report, it appears that you have had two gages—is that correct?

A. No; one. Tules grew all around and I could not get in to it.

Q. This record, Defendant's Exhibit X–8, are readings on both your old and new gages?

A. Yes; the same pipe.

Q. When was that pipe moved? Mr. Jessup states that the gage was moved early in 1927. Does that refresh your memory at all?

A. Yes; it was on the 3rd day of March.

I did not pay much attention to the rise and fall of the lake between the wet and dry seasons, only the readings; those readings that have been introduced in evidence are what I based it on. (R. 2523.)

Defendant's Exhibit X–8

GAGE READINGS BY MR. GEORGE BENSON

Benson's gage on Malheur Lake

Date			Gage	Readings
			Feet	*Inches*
1921	June	5	4	7
		23	4	8
	July	4	4	4
		14	4	3½
		22	4	1
		29	3	11
	Aug.	7	3	9
		14	3	7½
		21	3	5¾
		28	3	4½

Benson's gage on Malheur Lake—Continued

Date	Gage Readings	
	Feet	*Inches*
1921 Sept. 4	3	3½
25	3	1
Oct. 17	3	0
Nov. 7	2	11½
Dec. 27	3	2½
1922 Jan. 24	3	4
Feb. 7	3	4½
Apr. 2	3	9½
23	3	11
May 14	4	3½
24	4	3½
June 11	4	2¼
25	3	11½
July 5	3	9
6	3	8½
Nov. 16	2	3½
Dec. — gage frozen up.		
1923 Jan. 11	2	8
Feb. 19 gage frozen up.		
Apr. 8	3	11½
May 6	3	9½
June 4	2	6
10	2	5½
24	2	3
30	2	2½
July 22	1	11
Aug. 9	1	7½
18	1	6½
Sept. 11	1	2
Oct. 17	1	2
Nov. 1	1	3
1924 Jan. 31	1	8¾
Feb. 16	1	11
Mar. 2	3	0
Apr. 26	1	8½
May 11	1	7
31	1	0½
June 22	------	9
July 21	------	11½
Aug. 11	------	10
Sept. 3	------	10
Nov. 20	------	9½
Dec. — gage frozen up.		

Benson's gage on Malheur Lake—Continued

Date		Gage	Readings
		Feet	*Inches*
1925	Jan. 21	1	4
	Feb. 25	------	10¾
	Apr. 21	------	5
	May 19	------	10
	June 4	1	1
	17	1	2
	July 12	1	4
	Aug. 5	1	2
	Oct. 13	------	9
	Dec. 5	------	10
1926	Jan. 31	1	0
	Feb. 18	1	2½
	Mar. 4	1	0
	Apr. 6	1	0
	July 9	------	10
1927	Mar. 3	1	6
	Apr. 7	1	7
	10	1	7
	June 5	2	5
	24	2	9
	July 13	2	8
	Aug. 4	2	4
	9	2	3½
	25	2	1
	Sept. 7	1	11
	14	1	11½
	Nov. 5	1	9
1928	Feb. 17	2	10
	Apr. 13	3	10
	29	3	10
	May 20	3	10
	June 12	3	4½
	26	3	2
	July 7	3	1½
	8	3	0
	27	2	8½
	Aug. 6	2	5½
	Sept. 9	1	11
	Mar. 27	2	8½
1929	Apr. 10	2	8½
	25	2	9
	June 5	2	3
	July 16	2	1½
	Aug. 12	1	7

Benson's gage on Malheur Lake—Continued

Date	Gage	Readings
	Feet	*Inches*
1930 Feb. 25	1	9½
Mar. 26	1	10
May 23	1	4
27	1	3
Sept. 12	1	3
Oct. 21	1	2½
Dec. 3	1	3½
Feb. 10	1	2
Mar. 13		9½

U. S. GEOLOGICAL GAGE

(Installed Sept. 12, 1930, on Malheur Lake)

Date	Tenths of inches
1930 Sept. 12	3
Oct. 21	2½
Dec. 3	3½
1931 Feb. 10	5½
Mar. 13	1½

2. *Pelican Island*

a. Elevations

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

The maximum elevation of Pelican Island is 4,109 feet above sea level. (R. 95.)

b. Areas—Soil Conditions

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

The area of Pelican Island is 740 acres as computed by the use of the 4,093 feet elevation because that is the mean elevation of Mr. Neal's meander line as nearly as we were able to determine it. That acreage is above that elevation and down to what might be termed the south end of the island proper, which is at a point on the map

where we show a well. Below that there are 100 acres above the 4,093-foot elevation that might be termed a part of Pelican Island, but do not believe it bears the local name of Pelican but it is a part of the same string, making a total of 840 acres out there.

Pelican Island unquestionably has the appearance of having been there a great many years. (R. 95.)

Mr. PRIM ORTEGO, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I have always known Pelican Island. I do not know whether that was a bunch of sand piled up there or not; it might have been; it is not very sandy like it is at the Sand Reef—not that bad. I could not tell you what it is made up of. (R. 523.)

Mrs. OLLIE DARSEY, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

When I went on Pelican Island with my husband, hunting in 1907 (R. 659), it made a definite impression upon me. Pelican Island is a sand reef really in a way, and the pelicans nest there; and when we were there they were nesting. Perhaps one foot up there were a row of nests, and then another one, and so on up. We were looking at the nests. I did not observe what happened there in the springtime because I was never there after the water was low. (R. 660.)

Mr. GEORGE FRY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I might have seen Pelican Island but I do not know it by that name. (R. 1132.)

Major JOHN STAFFORD, called as a witness for the plaintiff, testified in substance as follows:

While I was down there at Malheur Lake with Captain Bendire I remember an island down there known as Pelican Island. (R. 1267.)

Mr. BLACKMAR. Q. And when you were at Camp Harney it was a well-known island then, was it not?

A. Yes, sir; it was there. (R. 1267–1268.)

Cross-examination:

Mr. LILJEQVIST. Q. Now, when you say you saw Pelican Island, are you referring to that promontory that stuck out from the north, out for about a mile, or are you referring to something you saw as you looked westerly from Windy Point?

A. I made no mental reservation or estimate of the physical features of it at all. I simply saw bodies of water.

I never did get on a hill and look out over the country.

I do not know how big Malheur Lake was (at that time).

Mr. LILJEQVIST. Q. Did you go past Windy Point in those days?

A. The road ran right by Windy Point.

Q. There was a road there at that time?

A. Well, what was known as a road. (R. 1268.)

Q. About how far was the lake from Windy Point in your best recollection?

A. I would have to guess at it. A mile more or less, to be sure. (R. 1269.)

Q. A mile more or less.

A. Yes.

I made no mental reservation of the conditions at all at that time. (R. 1269.)

Mr. JESSE O. ALBERSON, called as a witness for the plaintiff, testified in substance as follows:

I have been up around Pelican Island several different years, but the first time I was there was in 1887 when I was a boy. That time we were just starting through the country; we went from there around the lake to Diamond Valley. I was on the main land, and did not get out on the island, but could see it. I do not believe I ever was right on Pelican Island.

Mr. BLACHMAR. Q. Since 1887, you have always known it to be an island out there, and have seen it from time to time from the shore, have you?

A. Yes. (R. 1275.)

Mr. EDWARD ANDERSON, called as a witness for the plaintiff, testified in substance as follows:

I know where Pelican Island is and I have been there once or twice. At one time in the fall of about 1908 or 1909 I was out on that island on horseback with Dick Haines. There was quite a bit of land on Pelican Island at that time. (R. 1286.)

Cross-examination:

We went in there on Pelican Island from the Richard Haines place on the south side (of Malheur Lake). I did not ride down to Cole Island from there. (R. 1286–1287.) At the time I went onto Pelican Island from the south side it was practically—pretty dry; that was in the fall of the year, 1908 or 1909; it was not frozen. (R. 1287.)

Mr. WILLIAM HANLEY, called as a witness for the plaintiff, testified in substance as follows:

When I first came into the country, I did not become familiar with Pelican Island.

At that time Pelican Island was a breeding place, or headquarters for scavenger birds; and I would think that it probably grew pretty good grass as it was pretty well fertilized. (R. 1352.)

Cross-examination:

I remember Pelican Island (more than Cole Island) by being more familiar with it and just traveling to Anderson Valley and south of Steen's Mountain. (R. 1375.)

Mr. FAY COMEGYS, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Is Pelican Island one of a number of islands?

A. There is a ridge along there; I don't remember much about them.

I don't remember whether any portion of it was higher than other parts of the island. (R. 1432.)

Mr. SIDNEY COMEGYS, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

It seems to me that Pelican Island extended out from the north side (of Malheur Lake) three or four miles, something like that. I do not know of any other island in Malheur Lake that resembles Pelican Island; that has been a standing piece of land from the earliest time I remember. (R. 1460.)

Dr. LLEWELLYN EUGENE HIBBARD, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Do you know any reason why Pelican Island could not have been formed in the same way you observed in the building of the Sand Reef?

A. Yes, sir.

Q. Ice in chunks could have washed up toward Pelican Island and gouged that sand up?

A. It is not sand. Apparently it is this second-grade soil that is composed of different stuff, and it didn't look like it was brought from the bed of a lake and put there. As far as I could tell, it was the original formation. (R. 1643.)

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, testified in substance as follows:

In 1887 I went on Pelican Island hunting with a man by the name of John E. Roberts. That island is a little different to the makeup of the lake. It has a different soil. (R. 1648.)

Pelican Island was the largest island; Cole Island the next; and (then) Cane Island. (R. 1649.)

Mr. RALPH CATTERSON, called as a witness for the plaintiff, testified in substance as follows:

I have taken cattle over on Pelican Island, and also on Cole Island.

Mr. BLACKMAR. Q. How did you get your cattle out there?

A. Well, when we were working cattle on there—it has been dry these last few years—on Pelican Island, I worked cattle on there when I was a small boy, when we mudded them and swamped them on there. We put cattle on there for years. (R. 1709.)

Cross-examination:

Mr. LILJEQVIST. Q. Now, up near Pelican Island, did you ever have to swim your horse or cattle to get there?

A. I never swum a horse but have swum cattle.

Q. In order to get on Pelican Island you have swum cattle?

A. Yes, I have swum cattle. I had horses get down in the mud and cattle get down in the mud, and pulled them out. (R. 1718.)

Mr. MAURICE FITZGERALD, called as a witness for the plaintiff, testified in substance as follows:

On June 1, 1876 (R. 1781), Pelican Island had all the appearance of a permanent island, and it continued to be an island as long as there was sufficient water to surround it. (R. 1783.)

Mr. EDMUND J. MARTIN, called as a witness for the plaintiff, testified in substance as follows:

At the time I went hunting in the spring of 1888, it must have been early as March (R. 1921), in a boat, in the vicinity of Pelican Island (R. 1914–1916), there were at least a hundred head of cattle on Pelican Island. I helped Charlie Jones get them off of there.

There was no ice between the channel of the peninsula that runs out, and Pelican Island. There was a deep slough there but no water; we just drove the cattle through there and swam them across. (R. 1917.)

Mr. ARMSTEAD E. BROWN, called as a witness for the plaintiff, testified in substance as follows:

In 1884 when I first went into that country I recall seeing Pelican Island. I was not on that island that year. (R. 2178.)

Mr. WILLIAM L. FINLEY, called as a witness for the plaintiff, testified in substance as follows:

At the time I was out there in May, June, and the fore part of July, 1908, at Malheur Lake, out toward what we call Pelican Island, that island was evidently older, and was quite muddy; the surface was fairly solid; we camped for several days on that island and studied the birds; photographed the pelicans, gulls, terns, and other birds. (R. 2302.)

(No cross-examination.)

Mr. THOMAS L. VICKERS, called as a witness for the plaintiff, testified in substance as follows:

I never did pasture cattle in there on Cole or Pelican Islands, but I have ridden in there lots. I have ridden in there around Cole and Pelican Islands ever since I can remember, and during all that time those have been permanent islands. (R. 2315.)

c. Vegetation

aa. In the Early Days

Mr. THOMAS J. VICKERS, called as a witness for the plaintiff, testified in substance as follows:

I know where Pelican Island is but I have not been on it very many times. There has been a growth of greasewood on it ever since I have known it. (R. 255.)

Mr. PRIM ORTEGO, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Pelican Island has greasewood and sagebrush around it, but not very much. (R. 523.)

Mr. JOHN H. WITZEL, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I have been on Pelican Island but I do not know what kind of a formation it has; there was some greasewood on it; I could not say whether the soil was sandy—it was dry when I was on it. I did not pay any attention to how it was built up. (R. 1111.)

Mr. FRANK CATTERSON, called as a witness for the plaintiff, on redirect examination testified in substance as follows:

Mr. BLACKMAR. Q. This land of your brother's over there in section 20–29, is that the same kind of land that generally speaking you find on Pelican Island?

A. Yes, sir.

Q. And the same kind of grasses?

A. Yes. (R. 1194.)

bb. 1870–1880

Mr. MAURICE FITZGERALD, called as a witness for the plaintiff, testified in substance as follows:

I saw quite a number of bird nests on Pelican Island in June, 1876, when I was there with Captain (Major) Bendire; (R. 1781, 1783) there were some nests up on the sand dunes under the greasewood, and others on the edge where there was a higher growth of grass than salt grass. The most prominent vegetation on Pelican Island was greasewood. There were grasses, some salt grass, and coarser grass along the margin of the Island. I do not know the name of all those grasses, but I know there was salt grass and greasewood there.

During all that time that I have known Pelican Island, it has had greasewood, salt grass, and vegetation of that kind growing on it. (R. 1783.)

cc. 1880–1890

Mr. JOHN GARDNER, called as a witness for the plaintiff, testified in substance as follows:

There was a little greasewood on Pelican Island in 1883 when I was down trapping on Malheur Lake, but not very much, and there were grasses of different kinds. (R. 269.)

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, testified in substance as follows:

I went on Pelican Island in 1887 hunting with a man by the name of John E. Roberts. It had greasewood and stuff on it; it has a different soil, and everything is high, it has greasewood and stuff on it.

I have been there in the summertime when it is a nesting place for the birds; it was an unpleasant place to be there when the birds were nesting in the early days. (R. 1648.)

There was salt grass on Cole Island and Pelican Island. (R. 1649.)

Mr. EDMUND J. MARTIN, called as a witness for the plaintiff, testified in substance as follows:

The time I went hunting in the spring of 1888, it must have been as early as March (R. 1921), in a boat (R. 1915-1916), I observed a good deal of greasewood on Pelican Island, on the ridge; and birds by the thousand; pelicans and other birds. I do not know whether they were nesting; they had not commenced laying but there were a few laying. (R. 1916.)

The vegetation on Pelican Island consisted of all kinds of grasses and tules. I do not know what all the kinds of grasses there were; but of course, it was the kind that grows there. (R. 1917.)

Mr. JOHN G. DARSEY, called as a witness for the plaintiff, testified in substance as follows:

I know Pelican Island; we used to camp frequently on the point of Pelican Island. (R. 1958.) There was very little vegetation on Pelican Island when I was on it. Mostly greasewood and kind of a sand reef; there was also a kind of a little salt grass that grew around the edges of it, but not a great deal of that; some years more than others. (R. 1959.)

Mr. ARMSTEAD E. BROWN, called as a witness for the plaintiff, testified in substance as follows:

In 1884 and 1885 when I saw Pelican Island there was lots of greasewood on it; then there was some tules, and some grass, but we did not get out and look at it. (R. 2178.)

Cross-examination:

Mr. LILJEQVIST. Q. Mr. Brown, can you tell us any brand-new fact, after listening for days, as to your observation of that lake, which would be different to that testified to here by (R. 2178) various witnesses during this hearing?

A. Excuse me, but I haven't been listening here for days. I haven't been here excepting twice since the hearing started.

Q. Then you don't know all that has been going on here?

A. No; but I have listened a little since I came here. (R. 2179.)

dd. 1890–1900

Mr. FAY COMEGYS, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

There was some greasewood on Pelican Island and it was quite a nesting place for the birds. (R. 1432.)

Mr. JAMES A. TURNER, called as a witness for the plaintiff, testified in substance as follows:

I found salt grass and other kinds of grasses on Pelican Island. I do not know what a man would call them. Weeds. (R. 1725.)

cc. 1900–1910

Mr. ARCHIE MCGOWAN, called as a witness for the plaintiff, on redirect examination testified in substance as follows:

Pelican Island is really always regarded as a greasewood island. (R. 1571.) There is some salt grass on it, too. Greasewood ridge was a peninsula.

Since the water has been receding out there on Malheur Lake during the last few years, there is considerable salt grass growing within the Bird Reserve.

There are lots of tules up the Silvies River.

I remember when there were lots of tules up to the Red "S" Field; they were big and healthy tules on the Red "S".

I have seen some tules up the Blitzen River, but I am not so well acquainted up the Blitzen side of the lake, but I have seen tules up there in the river.

Mr. BLACKMAR. Q. Those tules up and down the Silvies River, would they extend for several miles up there?

A. When I first remember this valley, as I said a while ago, I have seen tules right up within a few miles of the town here, all around close to the river, and quite a ways from the river; all over what we call the Island; all over the Red "S" (R. 1572) Field, and those fields south there were lots of tules all over what is now meadow land here.

Q. In places those tules have been cut and burned off?

A. They have been, yes. (R. 1573.)

Dr. LLEWELLYN EUGENE HIBBARD, called as a witness for the plaintiff, testified in substance as follows:

I have been up on Pelican Island from time to time and there is salt grass on it, also greasewood.

I have been on Pelican Island very often, but only once for examining bird nests. The birds quit nesting there the season after I came there; they ceased to nest on Pelican Island; and all the rest of the time I have never found any bird nests there—I mean any of the water fowl, barring duck nests or goose nests. The birds gave that up as a nesting ground quite a while ago. I attribute that to the settler who began to use it more by putting stock on there. The cattle got to coming on there in considerable numbers, and the nests were destroyed. The last season the birds tried to nest there, there was not a bird hatched because of the skunks and coyotes destroying the nests; and the ravens finished it up. (R. 1604.)

Mr. RALPH CATTERSON, called as a witness for the plaintiff, testified in substance as follows:

The character of vegetation on Pelican Island since I have known it has consisted of salt grass and greasewood. (R. 1709.)

Mr. Joe Ormand Ausmus, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with Pelican Island but I have never cut hay on it. (R. 2133.)

Mr. William L. Finley, called as a witness for the plaintiff, testified in substance as follows:

In 1908, when I was at Malheur Lake making a survey, we camped on Pelican Island; the top of the island was all a matted growth of these tules. The tules grew up anywhere from 4, 5, 6, and 8 feet, and even 10 and 12 feet high; the highest ones; and the birds lighting on these they mass down and make a regular flat surface on which the pelicans and other birds nested; they nest right on the ground on this mass of tule growth. (R. 2302.)

From 1908 to 1917, the same conditions with reference to the tules existed. (R. 2304.)

(No cross-examination.)

ff. 1910–1920

Mr. Stanley G. Jewett, called as a witness for the plaintiff, testified in substance as follows:

The conspicuous vegetation on Pelican Island is greasewood. (R. 1997.)

gg. 1920–1931

Mr. Chester W. Pecore, called as a witness for the plaintiff, testified in substance as follows:

Along the top of Pelican Island from the Neal meander line at the southern extremity of Section 29, T. 25 S., R. 33 E. down to a well, about four inches on this map, north of the north meander line in Section 17, T. 26 S., R. 33 E., is a fairly heavy growth of greasewood along the top of the island in its higher points; in the lower portion (of the island) the greasewood does not grow, and in the other portions some of it is eight feet high, some of that stuff is two feet higher than my head, along the top of the island; you couldn't see over it. (R. 91.)

d. Water Conditions

aa. In the Early Days

Mr. Lee Minis Caldwell, called as a witness for the plaintiff, testified in substance as follows:

I never saw the water in the lake over Pelican Island. I was never on Pelican Island, but I could see it when I drove cattle around Windy Point. (R. 141–142.)

Mr. THOMAS GEORGE HOWSER, called as a witness for the plaintiff, testified in substance as follows:

I have never seen the water over Pelican Island: I do not think it ever went over that island. (R. 215.)

Mr. JOHN GARDNER, called as a witness for the plaintiff, testified in substance as follows:

And all the time that I have been familiar with Malheur Lake, I have never seen Pelican Island covered with water. (R. 269.)

I have seen Cole and Pelican Island prior to the time the Sand Reef was cut through. I saw it down there with Devine, swamping cattle; it was before the Sand Reef was broken through. They were not covered up with water, they always stood out.

There was tule marshes as long ago as I can remember. (R. 279.)

Cross-examination:

I have never seen the water over Pelican Island, and I have been out there in the winter time in the ice. (R. 289.)

Mr. WILL Y. KING, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with Pelican Island and I have never seen the water entirely over it. (R. 306.)

Mr. PRIM ORTEGO, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with Pelican Island, but in all my experience with Malheur Lake, I have never seen Pelican Island under water. (R. 512.)

In the early days, the pelicans and seagulls used to nest on those islands. I have been up there (on Pelican Island) when they were nesting. Pelicans do not make any nest; they lay their eggs right on top of the island. (R. 513.)

Mr. JAMES THOMAS BAKER, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with Pelican Island and I have never seen it covered with water. (R. 575.)

Mr. EMIL BAKER, called as a witness for the plaintiff, testified in substance as follows:

I have been on Pelican Island, but I do not remember whether I was ever on Cole Island. I can not say that I have seen pelicans nesting there because I was there mostly in the fall of the year.

I have never seen the water over Pelican Island at any time. (R. 593.)

Mrs. OLLIE DARSEY, called as a witness for the plaintiff, testified in substance as follows:

Pelican Island was always out of the water and I have never seen it covered up. (R. 650.)

Mr. CHARLES R. PETERSON, called as a witness for the plaintiff, testified in substance as follows:

I have been on Pelican Island many times. Pelican Island was out of the water. I never saw the pelicans nesting there. I have never seen Pelican Island under water. (R. 678.)

Mr. JOHN H. WITZEL, called as a witness for the plaintiff, testified in substance as follows:

I have been on what they call Pelican Island, but I have never seen Pelican Island under water. (R. 1107.)

Cross-examination:

I do not think I saw Pelican Island before the sand reef broke through, and I don't believe I would know what its condition was prior to that time. (R. 1109–1110.)

I have been on Pelican Island in the spring of the year, but I have never seen any ice piled up on the western part of the island (R. 1111), and I don't know what effect ice would have on Pelican Island. (R. 1112.)

Mr. FRANK CATTERSON, called as a witness for the plaintiff, testified in substance as follows:

I have been up around Pelican Island a good many different times, different years, but I have never seen it covered with water. (R. 1185.)

We get out to Pelican Island in different ways. A brother of mine owns a ranch right on the north end of Pelican Island (R. 1185), and that was on that lower end of his ranch; we put cattle in there in the fall of the year, and some winters all winter, and other winters only part of the winter. Usually we would cross with horses, but I have crossed in a boat and led the horses behind it. In taking the cattle out of there we put them across that channel and drive them out. (R. 1186.)

Cross-examination:

My brother had a place on the north end of Pelican Island. It isn't a full ranch, but I do not know how many acres there were to it.

Mr. LILJEQVIST. Q. Now, Mr. Catterson, in this case there is an area here that is surveyed by Mr. Neal. This big long place (indicating on map—Plaintiff's Exhibit No. 3) is not involved in this case. Looking at section 29, township 25 south, range 32 east, north of the lake, the meander line is shown here around this point, and what we call Pelican Island in this case, as far as this particular lawsuit is concerned (R. 1188), is below that point (indicating on map—Plaintiff's Exhibit No. 3).

Now, was this land of yours adjoining this ridge that is shown here? Can you give the description?

A. It was the south end of this ridge that runs here to this channel north of Pelican Island.

Q. The south end of this ridge, which is the south line of the fractional section 29, township 25 south, range 33 east, north of the lake, that was the south line of your brother's land, did you say? (R. 1188.)

A. Yes, sir.

There was a little slough or water opening between that and what is called Pelican Island. We did not always swim our horses across that. The year that we went out there to get them we crossed the channel.

Mr. LILJEQVIST. Q. Now, in the normal springtime where did water come with reference to that land around your brother's land at the place indicated?

A. Well, it was on both sides, east and west.

Q. Then the water came to the Neal line, on the east of this ridge and west of the ridge?

A. The water came up on both sides of that point.

Q. Would you say in the normal springtime that the waters of the lake flooded the low lands in the vicinity of the Neal line?

A. Yes; I would say that.

For a number of years we had higher water. (R. 1189.) I do not remember whether that dry period commenced after 1889.

I can not tell you the year that we put our cattle across into Pelican Island.

Mr. LILJEQVIST. Q. You moved in '87. The evidence shows '87, '88, and '89 were increasingly drier years. Was it at any time during that period?

A. No.

Q. It was after that?

A. It was after that.

I do not remember exactly the next dry period. I do not remember much about 1889. (R. 1190.)

bb. 1870–1880

Mr. MAURICE FITZGERALD, called as a witness for the plaintiff, testified in substance as follows:

Pelican Island has been above water at all times. I never saw the (Malheur) lake when you could not see Pelican Island. (R. 1783.)

Mr. ALPHENA VENATOR, called as a witness for the plaintiff, testified in substance as follows:

During all the time that I have been in and about Malheur Lake, I have never seen Pelican Island covered with water; I have never seen part of Cole Island covered. Cole Island is a peninsula, and it runs in this direction [showing]. And there were low places and high places on it; and of course, in high years it is submerged, but not all of it, no, sir; not in the seasons of the year that I would be in there, and that would be in February and March. (R. 2321.)

cc. 1880–1890

Mr. JOHN GARDNER, called as a witness for the plaintiff, testified in substance as follows:

At the time I was down trapping on Malheur Lake in 1883, I did not see Pelican Island covered with water. (R. 269.)

Mr. CAMPBELL C. KILBURN, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I think Pelican Island was some four to six feet above the water, but I would not be positive on it. (R. 743–744.)

Mr. WILLIAM J. DUNN, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with Pelican Island, and all the time I have been there, I have never seen it covered with water. I have not cut any grass there, but there has been grass cut there. There are old corrals there on Pelican Island. (R. 827.)

Mr. ORIN EUGENE THOMPSON, called as a witness for the plaintiff, testified in substance as follows:

From time to time I have been out on Pelican Island (R. 1507) but I have never seen it under water. (R. 1508.)

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, testified in substance as follows:

Ever since I have known Pelican Island (1887) it has been out of the water. (R. 1648.)

Mr. ALVA SPRINGER, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with Pelican Island and during the high water of 1894 that island was not covered with water.

SPECIAL MASTER. Then you mean, Mr. Springer, they never were covered because 1894 was the highest water you knew?

A. I meant to say they were never covered since I knew the country, and that was '88. As to what they were before that, why I don't know. (R. 2021.)

Mr. ALFRED L. MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

I know Pelican Island, and one year I helped Mr. Dick Haines cut some hay on it; that must have been in the ninteen hundreds; I cannot remember the exact year.

The first time I ever saw Pelican Island was in 1885, when I was on horseback and just looked across out there. (R. 2072.)

I never did see Pelican Island under water. (R. 2073.)

Mr. Wm. Henry McKenzie, called as a witness for the plaintiff, testified in substance as follows:

When I was a boy I was at Pelican Island in either 1888 or 1889. (R. 2150–2151.) We went out there to get eggs; we waded in a couple of inches, maybe three inches of water, and a foot of mud in the slough; that was where we waded through to get over there. We were on foot. I was with some other people of about the same age. All of our own family were there; the children and also my parents were there. (R. 2151.)

Mr. Rubin T. Hughet, called as a witness for the plaintiff, testified in substance as follows:

I observed Pelican Island the first time I saw Malheur Lake, from the east side of Malheur Lake, along which I traveled. That was in 1885.

I do not think that I have ever seen that island under water. Now, I will say again that I do not think that I saw Cole Island or Pelican Isand during the two years of extreme high water; I do not recall that I saw those islands.

Mr. Blackmar. Q. So that you exclude from your answer the years 1894 and 1897?

A. Yes, except that I would be free to state that under no condition of high water in Malheur Lake would Pelican Island be covered with water. (R. 2189.)

dd. 1890–1900

Mr. John H. Witzel, called as a witness for the plaintiff, testified in substance as follows:

I was on what they call Pelican Island before I went there with a boat. I went there on the ice. (R. 1107.) I was swamping cattle out of the lake, and the ice was breaking up. I was riding for myself at that time, but I was working with the Island Ranch outfit which they called the Ranch outfit. I think it was back toward the nineties, somewhere along in there. (R. 1108.)

Mr. Fay Comegys, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with Pelican Island; I could not say exactly when I first went on that island, but I have been on there several times along probably 1894 or 1895. I have never seen that island covered with water. It has always been an island ever since I have known it. I have been across (with cattle) there (Malheur Lake) in the winter-time when it was dry; I have swamped cattle out of there.

I have been hunting at the mouth of Springer's Spring and at the lake a time or two. (R. 1429.) I have ridden on horseback out to Pelican Island in the fall of the year, and I have been there a time or two in the spring. The earliest year that I rode out

there was along in 1894 or 1895. I think there was a slough there the first time (1894 or 1895) and the water was pretty muddy on the south side.

Mr. BLACKMAR. Q. And since that time, say prior to 1920, have you ridden out there when there wasn't any water around Pelican Island?

A. Well it was pretty high from '95 to 1900, the lakes were, pretty nearly every year, and then it gradually got drier. Well, from 1901 on the lakes dried up.

I do not think I have been there since 1920 (R. 1430), but I have been to Pelican Island before 1929, when there was no water around it. (R. 1431.)

Mr. BLACKMAR. Q. This place that you had down there, now owned by the Hill Brothers, did you get your water on that place from the Blitzen River, or did it come from the lake?

A. It came from the river—ran down and spread out. When the lake got high enough, why it backed up.

Q. Wouldn't you get your water on your place before the lake filled up?

A. Yes.

Q. And when the lake filled up it would just hold the river water on your place?

A. Yes.

Cross-examination:

With reference to the water of the lake backing up to the Neal meander line around Hill Brothers place, and the place east of there where I lived, some years it backed clear up above the old meander line (of 1877), if it was high enough water.

Mr. LILJEQVIST. Q. Well, ordinarily where did it come with reference to the Neal meander line at that place around Hill Brothers and where Judge Hughet claimed a place, and east of there?

A. Well, different years—some years it was high and some years it was lower.

Q. Well, did it usually come up to the old meander line (R. 1431) drawn by Neal in 1895?

A. Yes.

I have been on Pelican Island several times, but I do not remember which way I went on to it the first time. I have been on it both ways, from the north and from the south. I do not remember which way I was on it first, whether from the north or from the south. (R. 1432.)

Mr. LILJEQVIST. Q. In the earlier days you could not get onto it from the south at all without wading through a mile or two of water, a half mile of water or more?

A. In the fall of the year sometimes it got low, and there was quite a little slough there to cross. (R. 1432.)

Q. Were portions of Pelican Island covered by the higher (R. 1432) water of the lake?

A. Well, I don't know whether you would call it all covered or not. It was higher than ran out into the lake there.

Q. There is a place on Pelican Island shown on that map there that is about four miles long.

A. Yes.

Q. I am trying to find out in these earlier days when you knew it if that entire four miles of what is now called Pelican Island was above water at all stages of the water.

A. Yes, it was above water.

I think the whole four miles of it was above water. I do not know how much the Lake (Malheur) rose and fell there. (R. 1433.)

Mr. SIDNEY COMEGYS, called as a witness for the plaintiff, testified in substance as follows:

A long time ago I went out to Pelican Island; it was along in the late nineties, as near as I could say. I did not go out there in a boat; I went out there on horseback when it was frozen up; across the ice. I think I went out there one time when there was a big slough across; as near as I can recollect it was pretty muddy. (R. 1450.)

Cross-examination:

Mr. LILJEQVIST. Q. You talked about going across the slough on horseback to Pelican Island. Did you go along this long ridge to Pelican Island across the slough that is at the south end of section 29, township 25 south, range 33 east, which I am pointing out on the map? Did you go down that ridge?

A. I don't remember just how we did used to go there, but we went around pretty well toward Windy Point. I have not been in that country for 30 years, you might say. (R. 1459.)

Mr. JAMES A. TURNER, called as a witness for the plaintiff, testified in substance as follows:

At different times I have driven my cattle in there on Pelican Island in the fall of the year for pasture. I took them in in the fall of three different years, but I can not tell you what years they were; they were prior to 1900.

In taking those cattle in there I would start in from the north side of the (Malheur) lake and just drive them out; by the time I got down pretty well (R. 1725) toward Pelican Island there was some water there, probably a hundred yards across; I would drive the cattle across there and drive them right in on the island (R. 1726).

Cross-examination:

I waded across to Pelican Island one time. I do not know that I have ever seen a time a man could not wade out there; I don't think I ever did. (R. 1734–1735.)

Mr. CHARLES A. SPURLOCK, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Are you familiar with those islands called Cole and Pelican Islands?

A. I have been down there.

Q. Have you ever seen them covered with water?

A. No, I never did. (R. 1767.)

Mr. THOMAS T. DUNN, called as a witness for the plaintiff, testified in substance as follows:

I know what Pelican Island is, and I have been on Pelican Island lots of time. (R. 1824.) I have not seen Pelican Island entirely under water. (R. 1825.)

Mr. JEFF CAWLFIELD, called as a witness for the plaintiff, testified in substance as follows:

I never was very familiar with Pelican Island; I have been along the edge of it on the north side, but never was there; but I have never seen it under water. (R. 1893.)

ee. 1900–1910

Mr. J. L. CAREY, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with Pelican Island and I have never seen all of it under water, but I have seen the water around it. There were people on Pelican Island that cut and stacked hay. I have seen the water of Malheur Lake recede so that there was no water around Pelican Island, so that it would be possible to ride out on a horse to Pelican Island. (R. 798.) I have seen all of that end of the lake dry so that I do not think that there was any place on Pelican Island that you could not go to by riding on a horse. I have driven stock out on the edge of the lake and on Pelican Island to pasture. To get to Pelican Island we had to drive the cattle around the edge of the lake, going there from our holdings or properties (on the north side of Malheur Lake). In driving the cattle over on Pelican Island we never lost any of them because of being mired or getting drowned. (R. 799.)

Mr. ARCHIE MCGOWAN, called as a witness for the plaintiff, testified in substance as follows:

I have never seen Pelican Island covered with water. (R. 1551–1552.)

Dr. LLEWELLYN EUGENE HIBBARD, called as a witness for the plaintiff, testified in substance as follows:

I have never seen Pelican Island under water. I have seen a portion of it under water. It is a long island. (R. 1604.)

The coyotes and skunks got onto Pelican Island from the north approach where I have gone yearly to that particular place. It comes out on a peninsula that is owned by Mr. Bill Catterson, who has a cabin there, and it runs into the (Malheur) lake, quite a little ways, possibly three-quarters of a mile; then it comes to a large channel; and when there is a great amount of water in the lake, that channel is full, and I have seen it when I could not get across with my gum boots onto what we would call Pelican Island; but that channel was well defined, and is yet; when there would be water passing east of Pelican Island, this is the lowest place that any water can go to the eastern portion of the lake, and there are several sections of land, which were once under water, to the east of Pelican Island; it is the lowest place that water can get into that part of the (Malheur) Lake. There are other places that the water passes, but this is the lowest. The first water to leave Pelican Island will go through this particular cut, which is about 150 to 200 yards wide. The banks are well marked, and the ground is somewhat firm between the current of the water passing through there in the ebb and flow daily; there is an ebb and flow on account of the winds and water passing through there, and it keeps the mud away, and there is a good bottom. (R. 1605.)

The coyotes passed through there; the water would cease to fill that portion of the channel in parts of the year, and when it was there, the coyotes found it was just a short distance for swimming, and so (R. 1605) they passed across it; the skunks also got on there, taking up their permanent abode; and the birds would not use it any more for their nesting ground, and they haven't for years (R. 1606).

ff. 1910–1931

Mr. ORA WINFIELD HILL, called as a witness for the plaintiff, testified in substance as follows:

I remember Pelican Island, but I have never seen it under water. I have been on Pelican Island when there was no water around it. I went onto it on horseback from the north side of the lake, and I drove cattle right down Pelican Island, straight through to the south side of Malheur Lake; that was about 14 or 15 years ago, in the fall, about 1917 or '18. (R. 1544.)

(Recalled as a witness for the plaintiff.)

Recross-examination:

1917 was another very dry year; I drove cattle from one end of Pelican Island to the other that year. (R. 1719.)

Mr. STANLEY G. JEWETT, called as a witness for the plaintiff, testified in substance as follows:

I have never seen Pelican Island under water. (R. 1996.)

3. Cole Island

a. Elevations

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

The maximum elevation of Cole Island is slightly more than 4,095 feet, and in one or two places, perhaps two or three-tenths of a foot more than that, although it is not shown on the map. (R. 96.)

Mr. MOTT V. DODGE, called as a witness for the defendant, on cross-examination testified in substance as follows:

Mr. BLACKMAR. Now, in connection with Mr. Dodge's testimony, will you give me the height of Cole Island, Mr. Pecore?

Mr. PECORE. On the west, the ninety-foot contour is what might be termed the base of Cole Island, and the top of it is above 4,095 feet. It doesn't get up to 4,096, but it gets up above 4,095. (R. 2401.)

b. Areas—Soil Conditions

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

The area of Cole Island above the 4,093-foot contour is 350 acres. Cole Island has the appearance of having been there many many years.

The area of Dunn Island I included in the area of Cole Island because I could not determine just where Dunn Island leaves off and Cole Island begins. It is all the same string of islands through there. (R. 96.)

Mr. GEORGE FRY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I did not see Cole Island; I do not know anything about the islands by the names of them. (R. 1132.)

Mr. MARCELLUS B. HAYES, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

In the early days my brother and I used to have cattle on Pelican Island; sometimes we would ride out in that country there (in the vicinity of Cole Island), but I never heard much about Cole Island. (R. 1228.)

Mr. WILLIAM HANLEY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Cole Island is back in the evaporating pan. (R. 1373–1374.)

Mr. LILJEQVIST. Q. Did Cole Island ever impress itself upon your mind as something that you could see when the water was there?

A. Well, you could see an island, but it wouldn't interest you if it had no value for what you had in mind; for stock business.

Going backwards and forwards to Happy Valley and Diamond, I traveled along the southeastern part of Malheur Lake.

Mr. LILJEQVIST. Q. Anyway, this is correct, is it, that if there was such a thing as Cole Island in those days, from 1895 on, it wasn't big enough to really impress itself upon your memory as something definite?

A. It wasn't useful enough.

Q. At least it didn't impress itself upon your memory, did it?

A. No; it didn't. (R. 1375.)

Mr. MARION HORTON, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I never was on Cole Island. It made no distinct impression on me in the early days; I never had any occasion to go there. (R. 1473.)

Mr. ORIN EUGENE THOMPSON, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I first came into this country in 1877.

I could not say as to whether I saw Cole Island in the early days.

Mr. LILJEQVIST. Q. Cole Island didn't make any impression on you then?

A. No, sir, I heard that name, but I never was right as to where it is.

I did not go around the south bank of the lake; I was mostly on the east side of it. I have been around that road around the south side between the east point and Springer's Sodhouse. I could see over the lake. (R. 1512.)

Mr. LILJEQVIST. Q. Did you see anything that looked like an island where (R. 1512) Cole Island is?

A. No, I could not say as to the distance. Tules is about all you could see. Tules grew lots of times in the water, and you could not tell whether it was an island or a patch of tules, looking from the road.

Q. Where Cole Island shows on the map, you think it was a bunch of tules when you first saw it?

A. I couldn't tell whether it was tules or an island.

I do not think it was anything like Pelican Island. (R. 1513.)

Dr. LLEWELLYN EUGENE HIBBARD, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

What is called Cole Island in this case is quite different from what has been referred to as islands in the western part of the (Malheur) lake. Cole Island is not tule islands by any manner of means. The borders of it could have been caused by the gouging of the sands by ice, but the center has its old original base that had evidently never been on the bottom of the lake. (R. 1643.)

I would not guess at the acreage of Cole Island in any of those years that I have seen it when the water was there in the springtime. It was perhaps two and a half miles long, and the borders of it draw in very greatly when the waters come up. It would be from a few feet to three-quarters of a mile, and perhaps a mile in width. I do not know where you would say it stopped going to the south; I do not know what you would call the south point. (R. 1644.)

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, testified in substance as follows:

Pelican Island was the largest island; Cole Island the next; and (then) Cane Island. (R. 1649.)

Mr. RALPH CATTERSON, called as a witness for the plaintiff, testified in substance as follows:

I have taken cattle over on Pelican Island, and also on Cole Island.

Mr. BLACKMAR. Q. How did you get your cattle out there?

A. Well, when we were working cattle on there—it has been dry these last few years—on Pelican Island, I worked cattle on there when I was a small boy, when we mudded them and swamped them on there. We put cattle on there for years. (R. 1709.)

Mr. MAURICE FITZGERALD, called as a witness for the plaintiff, testified in substance as follows:

In those days, between 1873 and the fall of 1882 (R. 1774, 1784), Cole Island did not come to my attention. I think I could see some sort of an island, but I never was on it and was never near it. (R. 1784.)

Cross-examination:

I would not say positively that I saw what is called Cole Island, but there was another island; you could see an island besides Pelican Island at the distance.

I do not think there were tules on it; not that I could distinguish.

I could not tell you how far it was from Pelican Island; it would be quite a distance, though. (R. 1796.)

I do not know when they first started to cut grass on Cole Island; I never knew that they did cut grass on it. (R. 1797.)

Mr. THOMAS T. DUNN, called as a witness for the plaintiff, testified in substance as follows:

My house is on deeded land. My father started to build a frame of a house on Dunn Island and it stood there for many years. When he put that little frame of the house there, it was in the nineties, sometime, but I do not remember just when. I remember the house stood there, what was left of it, for many years.

Mr. BLACKMAR. Q. This island they call Dunn Island is kind of a continuation of Cole Island?

A. Yes.

I have been out to Dunn Island a good many times.

I have not seen the lake so high that it covered Dunn Island entirely. (R. 1820.)

My father never completed that house down there on Dunn Island; just the frame of the house is all. (R. 1821.)

Mr. EDMUND J. MARTIN, called as a witness for the plaintiff testified in substance as follows:

At the time I went hunting in a boat, in the spring of 1888, it must have been as early as March (R. 1921), in the vicinity of Pelican Island (R. 1914–1916), there was quite a bunch of horses on Guano Island (R. 1917).

Mr. BLACKMAR. Q. Can you tell me the direction of that island from Pelican Island?

A. As near as I can remember, it must have been about southeast, but I wouldn't be sure. If we could locate it on the map we could tell, but there was quite a good-sized island there, you know. I don't think it ever was covered with water.

Cross-examination:

Mr. LILJEQVIST. Q. Let us see where this Guano Island is. How big was that island; have you any idea?

(Thereupon the witness went to map.)

Mr. LILJEQVIST. Here is Pelican Island on this map [indicating to witness].

A. Well, we came in through here, you know, and down here [indicating].

Q. This is the peninsula?

A. Yes. Here is this part, which is a lake, and it was in here [indicating].

Q. Southeast of the peninsula, do you think, or somewhere in there?

A. Well, it would be right due south; it must be south. (R. 1919.)

Mr. JOHN W. HEINZ, called as a witness for the plaintiff, testified in substance as follows:

I have been to Cole Island a few times, but not to say that I know it. (R. 1943.)

Mr. JOHN G. DARSEY, called as a witness for the plaintiff, testified in substance as follows:

I have been around Cole Island, but I did not know it by that name. There is hardly an island in there I have not been on, but I did not know it by that name at the time. (R. 1958.)

Cross-examination:

I most surely was on Cole Island, but I did not know it by that name. (R. 1963.) I could not state what it looked like.

Mr. LILJEQVIST. Q. There is a place they call Cole Island here in the southeasterly part of the lake, westerly of Pelican Island, about

three miles, or a trifle over, running in a northeasterly and southeasterly direction. I will show you that on the map (Plaintiff's Exhibit No. 3.). Did you see anything that you recognized above the water that was an island with tules on it, or tule swamp lands [indicating to witness]?

A. Where is the Nine Mile Slough, where does that come in?

Q. The Nine Mile Slough is right here, and here is Pelican Island, and here is the lake [indicating to witness on map, Plaintiff's Exhibit No. 3].

A. We passed here, and there was a lot of open water on each side [witness indicating on map, Plaintiff's Exhibit No. 3].

Q. Now, here is the Malheur Slough, which is shown on the map in Section 10 [indicating to witness on map]. (R. 1964.)

A. Yes.

Q. Down to township 25 south, range 33 east. And here is Pelican Island in the same township and range—I mean Pelican Peninsula [indicating to witness on map].

A. Yes. (R. 1964.)

Q. And below that is what you called the slough.

A. Yes; we always called it the cut.

That cut or slough was quite a deep channel at times. It was midside to a horse; I have heard several say they swam a horse across there, but I never did.

There was water to the east and to the west of it (Cole Island). (R. 1965.)

I do not know whether Cole Island is bigger than Pelican Island, or higher, or lower than Pelican Island; I had no way of measuring it. (R. 1965–1966.)

Mr. Alva Springer, called as a witness for the plaintiff, testified in substance as follows:

I have seen Mr. Cole who lived on Cole Island. He built a little cabin down there. (R. 2021.)

Cross-examination:

I do not know that I could describe Cole Island as I first saw it, or what it looks like now, as far as that goes. (R. 2045.)

Mr. Rubin T. Hughet, called as a witness for the plaintiff, testified in substance as follows:

I heard considerable testimony here, Mr. Blackmar, and I have heard references to Cole Island and Dunn Island. Now, my conception of those islands, there were two separate elevations; that is, they were not the same formation, because near the shallow end of Dunn Island is a channel there through which the waters flowed and filled up this small lake which extended southward. I have heard it named the Dunn Lake; but I did not know that it was called Dunn Lake until then. (R. 2187.)

Mr. BLACKMAR. Q. There was one witness (Edmund J. Martin, R. 1917) who mentioned an island here the other day, called Guano Island. Is that island known to you?

A. No, sir. (R. 2193.)

Cross-examination:

The first years that I knew Cole Island it did not make any impression upon me, I did not notice it particularly. (R. 2193.) I do not know whether that island has been gradually building up for the last 50 or 60 years by the movement of water and sand, and things blown on it. (R. 2194.)

Mr. THOMAS L. VICKERS, called as a witness for the plaintiff, testified in substance as follows:

I never did pasture cattle in there on Cole or Pelican Islands, but I have ridden in there lots. I have ridden in there around Cole and Pelican Islands ever since I can remember, and during all that time, those have been permanent islands. (R. 2315.)

Mr. MOTT V. DODGE, called as a witness for the defendant, on cross-examination testified in substance as follows:

Mr. BLACKMAR. Mr. Pecore, in connection with Mr. Dodge's cross-examination, give me the approximate width of Cole Island on the line to which we have been referring on Defendant's Exhibit No. X-6.

Mr. PECORE. Do you want his north and south line, or east and west?

Mr. BLACKMAR. On his east and west line.

Mr. PECORE It would be about 18 chains, which is about 1,100 feet. (R. 2399.)

c. Vegetation

aa. In the Early Days

Mr. JOHN GARDNER, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Cole Island in the early days had some tules, sugar grass, and salt grass on it. Sugar grass will grow with some water on it, but not too much. Salt grass is a grass that starts to spring up along the edge of the lake when the water goes down. (R. 292.)

Tules have to have water, and if they don't, they will die. The roots substantially have to be in water for tules to survive, they have to be down where they can get water or they die. (R. 291.)

There were tules and grass around the edge of those islands, and the center of the island had salt grass and other grasses that came up. (R. 299.)

Mr. JAMES THOMAS BAKER, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I do not remember whether or not I saw greasewood on Cole Island. (R. 581.)

Mr. EMIL BAKER, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I am not sure that I know anything about Cole Island.

Mr. LILJEQVIST. Q. Well, there is some area down there it is claimed some salt grass is on, extending southerly or southwesterly from Pelican Island?

A. Yes, sir.

Q. Do you remember any appearance of land sticking above the water when you first saw it?

A. Yes, sir. I have been over on that side, towards where they call that Cole Island, but I am not sure whether I know it or not.

Q. Didn't the people who owned that land around that part of the lake cut hay down there; the hay was caused by the flooding of Cole Island from the waters of the spring?

A. They would cut hay down there, yes.

Q. That was one of the good hay places, wasn't it?

A. Yes, sir.

Q. And there was no sagebrush or greasewood in there?

A. No, sir; I think not. (R. 606.)

Mrs. OLLIE DARSEY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I do not recall anything about Cole Island; it did not make any impression on my mind; they all looked "tules" to me. (R. 659.)

Mr. WILLIAM HANLEY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

With reference to the salt grass growing above it (the lake) at the edge, there is a lot that has not any salt grass on it. The lake bottom is pretty well made up of that white chalky soil. (R. 1374.)

bb. 1880–1890

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, testified in substance as follows:

There was some greasewood and stuff on Cole Island, when I first saw it, and I have seen the people cut some hay on there in later years. (R. 1648.)

There was salt grass on Cole Island and Pelican Island. (R. 1649.)

Mr. GEORGE MARSHALL, called as a witness for the plaintiff, on recross-examination testified in substance as follows:

Salt grass grew on Cole Island; sugar grass grew on it; water grass grew on it; and every kind of grass that grows in the country, grew (on that island).

Sugar grass requires water, but it isn't necessary to cover it over in water, put it under the water, flood it, but to subirrigate it makes good grass. (R. 1704.)

Mr. EDMUND J. MARTIN, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Did you also pass Cole Island on that day?

A. Well, chances are I did, but I didn't know the name of it. We visited all of those islands every place around there. We cruised all over the lake for days and days. I remember where Pelican Island was, and then there was a Cole Island which (R. 1916) they called Guano Island; and then there was another island by the name of Cane Island. The other islands I didn't know the names of. We cruised around them for days and weeks.

On Guano Island, it was the same way as on Pelican Island; there were all kinds of grasses and tules growing there.

The vegetation on Guano Island was good feed for horses and stock, and they could stay there all winter. (R. 1917.) I think there was some greasewood on the island, but I can not remember for sure about that. (R. 1918.)

Mr. ALVA SPRINGER, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

There was vegetation on Cole Island; I cut hay on that island for about three years; wild hay; I think it consisted mostly of a kind of water grass. (R. 2045.)

Mr. RUBIN T. HUGHET, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I do not recall seeing greasewood on Cole Island. (R. 2194.)

cc. 1890–1900

Mr. FAY COMEGYS, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Cole Island was covered with swamp grass. No portion of it in the early days was covered with salt grass, just swamp grass. (R. 1434.)

Mr. SIDNEY COMEGYS, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

There was quite a little vegetation along Cole Island. (R. 1460.)

Mr. THOMAS T. DUNN, called as a witness for the plaintiff, testified in substance as follows:

The vegetation that grows on Dunn and Cole Islands consists of salt grass, wire grass, and tules. (R. 1821.)

Cross-examination:

The vegetation on Cole Island when I first saw it was salt grass, wire grass, and tules. The salt grass was on the higher part, and below it was wire grass, and then came the tules. (R. 1836.)

My brother (P. F. Dunn) used to cut hay there on Cole Island and I used to help him. He is dead now. He is not the brother that was drowned. That was my younger brother who was drowned in the Blitzen River in 1904.

I do not know how many tons of hay my brother used to cut off Cole Island.

The wire grass stayed where the water stayed longer more (R. 1837) than salt grass did.

Salt grass has to have water just right to make it grow; not too much. (R. 1838.)

Right on top of Cole Island was salt grass; below that was wire grass, and below that were tules. (R. 1837.)

Mr. JEFF CAWLFIELD, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

When I saw Cole Island, it had greasewood on it; I am sure it had greasewood on it. (R. 1894.)

On the knolls on the north part of the lake, nothing grew on them except salt grass and greasewood. (R. 1894–1895.)

Mr. ALVA SPRINGER, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

There was a little bit of salt grass that was on top of the (Cole) island in places; it wasn't big enough to cut hay. (R. 2045.)

Mr. JOHN MARSHALL, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Did you ever see any sagebrush or greasewood on Cole Island?

A. Yes. (R. 2243.)

dd. 1900–1910

Mr. ARCHIE MCGOWAN, called as a witness for the plaintiff, on redirect examination testified in substance as follows:

I have seen most all kinds of vegetation on Cole Island that grows around the (Malheur) lake. There is sugar grass, salt grass, and more or less tules. (R. 1571.)

Dr. LLEWELLYN EUGENE HIBBARD, called as a witness for the plaintiff, testified in substance as follows:

The vegetation on Cole Island when I first saw it was very diversified. It has very many kinds of plants there. From the water's edge up here are tules; then there are weeds and nettles, and that is different from any other island, if you call it an island.

It has a black weed that I do not know the name of which grows 18 inches, giving it a black appearance on the whole island; then there is salt grass on it, and some wire grass. All these islands of that nature have some little greasewood; there is a portion of it that water never goes over, and that has a different vegetation than

that which has had water over it in the last two or (R. 1606) three years, and so there is a difference in vegetation. (R. 1607.)

Mr. RALPH CATTERSON, called as a witness for the plaintiff, testified in substance as follows:

I do not remember seeing any greasewood on Cole Island, nor salt grass. It is a feeding—it has turned into salt grass there now, in spots; you can see the salt grass there, it has not existed only since these dry years. (R. 1710.)

Mr. JOHN G. DARSEY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. The highest elevation is not higher apparently than the meander line. Did you see anything there uncovered in the springtime?

A. In the fall there were lots of times there were tules, but it is all gone now. In the fall you could go out on those points and shoot.

Q. Now, take a place here substantially three miles west of Pelican Island, there is what is marked on this map as Cole Island, extending from the northeasterly to a southwesterly direction toward the south side of the lake. Do you remember that area?

A. Yes.

Q. Now, what did that look like?

A. Well, it was just a string of islands through there. I couldn't hardly tell you what it looked like.

Q. Well, what was growing on it?

A. A good deal of salt grass, the same as the others; there is more vegetation on that island than Pelican Island. (R. 1965.)

Cole Island did not make very much of an impression on my mind because I knew what it was.

Mr. LILJEQVIST. Q. Well, if it looked anything like Pelican Island you could picture it, couldn't you?

A. I suppose so; yes.

Q. Wasn't it mostly tules in that particular area, what we now call Cole Island? (R. 1966.)

A. Well, there are tules there that I was on and shot from a great deal, and we usually hunted from tule patches; we would run the boat up into a tule patch to hide. (R. 1966.)

Mr. JÓE ORMAND AUSMUS, called as a witness for the plaintiff, testified in substance as follows:

There is a little cane on Cole Island.

I am familiar with Cole Island but I have never cut hay on it. (R. 2133.)

ee. 1910–1920

Mr. STANLEY G. JEWETT, called as a witness for the plaintiff, testified in substance as follows:

I have been on Cole Island a good many times. The vegetation there along the edges of it consisted of a heavy growth of tules; and

on the higher ground, there was so-called wire grass and sugar grass, and a great variety of weeds which made good forage for livestock. Probably the most noticeable species of weeds are nettles which have come up here in great quantities, especially during the last few years. (R. 1996.)

ff. 1920–1931

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

Some land at the top of Cole Island is covered with a good growth of salt grass, pretty well from a point, say a mile and a half north of the north tower (on the island) clear down to practically the southern terminus of the island where it joins the mainland. (R. 94.) There was no foxtail on Cole Island that I noticed. (R. 96.)

Mr. STANLEY G. JEWETT, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

When I was near Cole Island in 1922, I saw no sagebrush or greasewood there. (R. 2006.)

d. Water Conditions

aa. In the Early Days

Mr. JOHN GARDNER, called as a witness for the plaintiff, testified in substance as follows:

I have never seen the water over Cole Island. (R. 269.)

I have seen Cole and Pelican Islands prior to the time the Sand Reef was cut through.

I saw it down there with Devine swamping cattle; it was before the Sand Reef was broken through. They were not covered up with water, they always stood out. There was tule marshes as long ago as I can remember. (R. 279.)

Cross-examination:

I have never seen Cole Island covered with water. (R. 291.)

Mr. PRIM ORTEGO, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

Mr. LILJEQVIST. Q. Now, the Cole Island that you have talked about—do you remember Cole Island?

A. No, sir.

Q. There was not anything such as Cole Island when you were in there?

A. There might have been, but not at the present time. (R. 523.)

Mr. JAMES THOMAS BAKER, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with Cole Island, but I have never seen it covered with water. (R. 575.)

Mr. EMIL BAKER, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I have never seen all of it (Cole Island) covered with water. I have not been right down in there during ordinary high water. (R. 606.)

Mr. CHARLES R. PETERSON, called as a witness for the plaintiff, testified in substance as follows:

I have never seen Cole Island under water. (R. 678.)

Mr. CLARENCE THOMAS CAREY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I have seen Cole Island but I know very little about that side of the lake. I have never seen Cole Island under water. (R. 773.)

Mr. JAMES M. BRANDON, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I know where Pelican Island and Cane Island are located; I am pretty sure that Cole Island is on the other side of Cane Island. If you will show me on the map (Plaintiff's Exhibit No. 3) I may be able to locate it. (Map examined and Cole Island pointed out to witness by Mr. Liljeqvist.) (R. 971.)

I do not know very much about Cole Island; never been right down on Cole Island in the wintertime after cattle; have been around it on the other side of it, but most all the time when we were in there swamping cattle there was water around Cole Island.

I do not think I have ever seen Cole Island under water. We could see it from this side; we could look back across it when we were away down on the island a little ways. (R. 972.)

Mr. LILJEQVIST. Q. Mr. Brandon, when the Government was investigating this matter they took your statement, didn't they, before you were put on the witness stand here?

A. Yes, sir. (R. 994.)

Q. Now, you were asked by the Government attorney as follows:

"Q. Did you ever see the lake high enough to cover Cole Island?

"A. I think I have. I know I have."

Did you make that statement?

A. Well, I think I did, but I didn't just exactly know what they called Cole Island. We used to call that country down there in those lakes "Cane Island" in the early days here, and I didn't know a Cole Island.

Q. Do you know what is Cole Island?

A. I saw it on the map; yes, sir.

Q. It has a little salt grass on the top, and extends in a southwesterly direction toward the Martha Dunn place?

Q. Do you remember anything about that now?

A. Well, I might have been down in there at that time in those days, but I don't remember that. (R. 994.)

Mr. JOHN H. WITZEL, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

I am familiar with Cole Island, but I have never seen it under water. I saw water going through the low places; they called it all Cole Island, but there would be some low places where it would be wet and muddy in getting across. I can not tell you how much of Cole Island extended above the ordinary high water, and I could not tell you the size of it because I never paid any attention. I have seen some little spots of hay on it. (R. 1110.) I don't know whether it was flooded or subirrigated. They had a little stock of hay there on the island.

I never examined the ground to look and see what the formation of Cole Island is. (R. 1111.)

Mr. FRANK CATTERSON, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. What about Cole Island? I understand that is a little low island.

A. I don't know much about it. It is on the south side of Malheur Lake, but I don't know how much about it. (R. 1185.)

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I have seen a good deal of Cole Island under water, but I could not state the acreage, because I never paid much attention to it, or gave it much thought. (R. 1661.)

Mr. C. B. MCCONNELL, called as a witness for the defendant, testified on cross-examination as follows:

I have hunted around the lakes.

Cole Island has been known to me for a good many years.

Mr. BLACKMAR. Q. The fact of the matter is, everybody in this community has recognized it as a permanent island, haven't they?

A. Why, it is referred to as Cole Island. I don't know whether it is a permanent island. There is a strip of land that is known as Cole Island.

It is not an island. There are times in the year there would be a number of projections above the water. They would be cut off in places.

Mr. BLACKMAR. Q. But Cole Island, according to your information, has a definite location in that lake?

A. Yes. (R. 2420.)

Q. And so known in this community?

A. Yes. (R. 2421.)

Redirect examination:

Mr. LILJEQVIST. Q. Are you stating at springtime, when the waters are in there in the spring, that Cole Island is not entirely under water, or is above water?

A. Why, it depends entirely on the height of the water.

SPECIAL MASTER. There could be water high enough?

A. There could be water high enough, yes.

Mr. LILJEQVIST. Q. From your knowledge of that country, was the height of the water in the springtime higher than when you were out there on the ice?

A. Yes, after the run-off. (R. 2421.)

bb. 1870–1880

Mr. ALPHENA VENATOR, called as a witness for the plaintiff, testified in substance as follows:

During all the time that I have been in and about Malheur Lake, I have never seen Pelican Island covered with water; I have never seen part of Cole Island covered. Cole Island is a peninsula, and it runs in this direction [showing]. And there were low places and high places on it; and of course, in high years it is submerged, but not all of it, no, sir; not in the seasons of the year that I would be in there, and that would be in February and March. (R. 2321.)

cc. 1880–1890

Mr. CHARLES R. PETERSON, called as a witness for the plaintiff, testified in substance as follows:

In the early '80s I was on Cole Island in the springtime swamping cattle. Cole Island was out of the water at that time. (R. 678.)

Cross-examination:

The Cole Island that I have described when I saw it in the early '80s (R. 678) looked like an old barren island in the lake; I am pretty sure there was some greasewood on it; I was never there but once but it wasn't a large island, as I remember; I couldn't say how big it was to be honest with you; couldn't make an estimate; (R. 690) it may have been a mile more or less, but my recollection is that it was a rather small island; it wasn't very wide; think it had salt grass on it; it was a true island surrounded by water; I saw it in 1885, I think; I saw it many times after that just at a distance; but I never was on it but once. The height of what I call Cole Island above the water in the spring run-off would vary from probably 18 inches to 2 feet in some places, or something like that, and if I remember right, there were no tules around it. (R. 691.)

Mr. LILJEQVIST. Q. Well, didn't the people when they subsequently moved in there cut some hay on Cole Island?

A. I do not remember as to that. (R. 691.)

Q. You do not remember whether they did or not?

A. No. (R. 692.)

Q. You do not know whether they had to have it flooded in order to have hay? You don't know anything about that?

A. This island might not have been Cole Island.

Q. We are talking about something that has been termed an island extending southerly and southwesterly from Pelican Island.

A. No.

Mr. BLACKMAR. It is four miles west of Pelican Island.

Mr. LILJEQVIST. What is that extension?

Mr. BLACKMAR. Isn't that Dunn Island?

Mr. PECORE. This is Cole Island away over here, Mr. Liljeqvist. This is just a little hump [indicating on map, Plaintiff's Exhibit No. 3].

Mr. LILJEQVIST. Cole Island comes in at the old Dunn place.

A. If that is the case, then there was another little island in here.

Mr. LILJEQVIST. Q. How far westerly of Pelican Island was this island that you were talking about?

A. I do not think it was over two or three miles.

Q. Now, away back there about four or five miles on this map (Plaintiff's Exhibit No. 3), there was a place marked Cole Island? (R. 692.)

A. Let me see. This is Pelican Island. Well, this island, according to that map (Plaintiff's Exhibit No. 3), I would say laid right in here. (Witness indicating on diagram.) (R. 693.)

Q. Somewhere south of the windmill marked on this map, Plaintiff's Exhibit 3?

A. I don't know anything about the name of it.

Q. You are pointing out a place a little south of where this windmill is?

A. Yes.

Q. Off to the west of that there is something that has been called in this case "Cole Island." Did you ever see that place?

A. I expect I have seen it from a distance, but I don't remember being on it.

Q. You say you think you did? Do you remember seeing it?

A. I probably have; but this other island I remember distinctly seeing it. There was a bunch of cattle on that island, after the lake broke, and Stauffer and myself went out to get the cattle, and when we got down there the ice was formed, and we waded the water from the shore of the lake to the island; we were afraid to ride the horses, and when we walked we could feel our way, and we went in and got the cattle and took them out, and that was the only time I was on that island.

Q. Now, you haven't any distinct recollection of anything (R. 693) west of that out in the lake called an island?

A. No, I have not.

Q. If there was such a thing in the early days, you haven't any memory of it?

A. I haven't any memory. I heard of Cole Island, but I had very little to do with that part of the country. (R. 694.)

Q. You did not have any trouble in seeing Pelican Island, did you?
A. No.
Q. If any island resembled Pelican Island you would have seen it and remembered it?
A. If it was anywhere close I would.
At one time I was pretty well out into Malheur Lake west of Pelican Island.
Mr. LILJEQVIST. Q. And out in the center of the lake, the edges of the lake were a great distance away, weren't they?
A. Yes; they were quite a distance away.
Q. As a matter of fact, when you got to the center of that lake you could hardly see the shore, could you?
A. Yes; it was pretty hard to see these shores.
Q. You knew you were really out in the center of a lake when you got out in the center of that lake, did you?
A. Yes. (R. 694.)

Mr. WILLIAM J. DUNN, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with Cole Island, but I have never seen it entirely covered with water; I have seen water on the low places; my brother has cut hay on Cole Island. (R. 827.)

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, testified in substance as follows:

I know Cole Island; I have seen Cole Island with the water pretty well up on it, but that seems to be an island well fixed there, too, permanent; it was never washed up. (R. 1648.)

Mr. GEORGE MARSHALL, called as a witness for the plaintiff, on recross-examination, testified in substance as follows:

I have been on Cole Island lots of time, but I never saw Cole Island under water. (R. 1703.)
The Oard brothers cut hay on Cole Island several times; lots of people cut hay on Cole Island. It was an island right through the lake, the lake on the east and the lake on the west, and a big island there, and this subirrigated that island and kept it damp and grew grass. (R. 1704.)

Mr. EDMUND J. MARTIN, called as a witness for the plaintiff, testified in substance as follows:

I think we camped all night on that (Guano) island, and it was perfectly dry. (R. 1918.)

Mr. ALVA SPRINGER, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with Cole Island, and during the high water of 1894 that island was not covered with water.
SPECIAL MASTER. Then you mean, Mr. Springer, they never were covered because 1894 was the highest water you knew?

A. I meant to say they were never covered since I knew the country, and that was '88. As to what they were before that, why I don't know. (R. 2021.)

Cross-examination:

I have never observed Cole Island under water. (R. 2031.)

I have never seen Cole Island under water.

Mr. LILJEQVIST. Q. How much have you seen it in the springtime sticking above the water, and what proportion of it?

A. Oh, that is a hard question. Cole Island is a long strip, and I have seen the water in a place or two cross that (R. 2044) island in sloughs that run across it when the water got high in the (Malheur) lake, but I never saw the island covered with water.

There was vegetation on Cole Island; I cut hay on that island for about three years; wild hay; I think it consisted mostly of a kind of water grass. The water got up high enough on it to raise that hay crop; it never got clear over it to flood it; it would get on the edges, and the rest of it I suppose was subirrigated.

Mr. LILJEQVIST. Q. Let's get it that way: How big was (R. 2045) the salt grass area in acres in your best judgment?

A. Well, I will tell you, Mr. Liljeqvist: This island is a long strip, and it ain't very wide, but it is quite a long place, and the time we cut hay in there we had I think five hay corrals strung up and down this island, and in order to keep (R. 2045) from hauling that hay supply, and they were small stacks, probably from 10 to 25 tons in a stack. Some of them were smaller. This strip where we cut hay some places was wider than others. It varied. But it was a long strip down through there.

Q. In your judgment, in the last number of years, when that lake has gone dry and the wind and sand has been blowing, do you think it has been building up the island any?

A. I don't think so.

I have seen ice in the (Malheur) lake on both sides of that island.

I think the wind blows from most any direction there.

I have never seen ice piled up on that island. (R. 2046.)

Mr. ALFRED L. MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

I know Cole Island, and I have helped cut hay up there on that island. (R. 2072.)

The first year I saw Cole Island I think was in 1887.

I never did see Cole Island under water.

Dunn Island is a continuation of Cole Island the way I understand it.

I have helped cut hay on Dunn Island. I have seen other years when people cut hay there; I saw lots of years they had hay in there, cut hay and stacked it and fed it out. (R. 2073.)

dd. 1890–1900

Mr. FAY COMEGYS, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Cole Island was a great deal lower than Pelican Island?

A. Yes.

Q. In the springtime, was there very much of Cole Island showing above the water?

A. No; in 1897 and 1898, I think it was pretty nearly under water when I was out there one spring. (R. 1433.)

Q. Take the ordinary years?

A. Ordinarily, no; there was a little land out, I think. (R. 1434.)

Mr. SIDNEY COMEGYS, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Cole Island, did that make any impression on you in the earlier days?

A. No; we used to go in there and out. It is an island.

Q. Did the water flood it enough to raise grass there?

A. It came up high at times.

Q. Who, as time went by, kept cutting hay on Cole Island? Billy Dunn?

A. I think Ted Dunn.

I don't remember any island in there by the name of Dunn Island. (R. 1460–1461.)

I think I have been out on Cole Island in the wintertime on the ice; I do not think there was much ice to cross; I do not believe we crossed very much ice; that was in the nineties; and all the riding I ever did was in the late nineties. (R. 1461.)

Mr. ORA WINFIELD HILL, called as a witness for the plaintiff, testified in substance as follows:

I remember Cole Island, but I have never seen it under water. (R. 1544.)

Cross-examination:

I never was on Cole Island in the springtime.

At the time I saw Cole Island above water I was gathering cattle in the fall and in the winter. (R. 1550.)

Mr. CHARLES A. SPURLOCK, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Are you familiar with those islands called Cole and Pelican Islands?

A. I have been down there.

Q. Have you ever seen them covered with water?

A. No; I never did. (R. 1767.)

Cross-examination:

Mr. LILJEQVIST. Q. You don't know where the water was on Cole Island?

A. No; I was never on it at that time. (R. 1767.)

Mr. THOMAS T. DUNN, called as a witness for the plaintiff, testified in substance as follows:

I have not seen the lake so high that it covered Dunn Island entirely. (R. 1820.)

Since I moved in there (near Malheur Lake) I have been familiar with Cole Island. (R. 1820.) I have not seen the (Malheur) lake entirely cover Cole Island. (R. 1821.)

Cross-examination:

Mr. LILJEQVIST. Q. Now, Cole Island, as it is called in this case, Dunn Island, and then Cole Island, do you remember when you first saw Cole Island?

A. I don't remember the first time.

I have not seen most of Cole Island under water in the spring-time period of the year; there was always quite a bit of Cole Island out of the water. (R. 1836.)

I think at times the salt grass was touched by the water just a little while, the edge of it. (R. 1838.)

Redirect examination:

There was a house down in there (Cole Island) that was built a long time ago by a man by the name of Cole. I have seen Mr. Cole but that has been a long time ago. He has left the country. (R. 1840.)

Mr. Cole, his wife, and children lived there on Cole Island one summer. He was a poor man, just took his family down in there to this house, and he went away. I don't know where (R. 1843) he went, and they stayed there mostly one summer, then they left.

Mr. BLACKMAR. Q. They stayed there long enough to get the name "Cole Island," didn't they?

A. I think that is the way it was named. It must have been. Their name was Cole. (R. 1843.)

Recross-examination:

Mr. LILJEQVIST. Q. Couldn't he find enough vegetation to keep him there?

A. No; his wife was there, and she went down on the island after a cow one evening, and while she was gone she saw a man ride up to the house, and he got off and went in and got some stuff, and came out and got on his horse, and rode off, and when she got there, the grub was all gone, so she could not stay any longer. (R. 1843.)

Mr. JEFF CAWLFIELD, called as a witness for the plaintiff, testified in substance as follows:

I am pretty well familiar with Cole Island, and I have never seen it under water.

Cross-examination:

I could not say how high the water gets onto Cole Island in the spring. I was never in there; I could not say how high. You could see the island. When I saw Cole Island in the spring (R. 1893) I just saw a black streak there, that is about all. (R. 1894.)

Mr. ALVA SPRINGER, called as a witness for the plaintiff, testified in substance as follows:

When I first knew Cole Island there were a lot of tules around the borders of it, next to the water. I have never seen any sagebrush or greasewood on it.

I have not been on that island for the last year or two. (R. 2046.) When I first saw the island I never saw any sagebrush or greasewood on it. (R. 2047.)

Mr. RUBIN T. HUGHET, called as a witness for the plaintiff, testified in substance as follows:

I did not observe Cole Island until along in the nineties. I observed it then in riding for cattle along the southerly shore of Malheur Lake.

I do not think that I have ever seen Cole Island under water. Now, I will say again that I do not think that I saw Cole Island or Pelican Island during the two years of extreme high water; I do not recall that I saw those islands.

Mr. BLACKMAR. Q. So that you exclude from your answer the years 1894 and 1897?

A. Yes, except that I would be free to state that under no condition of high water in Malheur Lake would Pelican Island be covered with water. (R. 2189.)

Mr. JOHN MARSHALL, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I have never seen Cole Island covered with water; never seen it plumb covered with water; I do not think there was ever a time we could not go down there hunting, because that is what we used to do. We did lots of hunting. (R. 2243.)

ee. 1900–1910

Mr. J. L. CAREY, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with Cole Island and I have never seen the water over it, but I have seen the water around it. I was never around Cole Island at the time of the year to see whether there was any hay down on it, so I do not know whether they hayed there or not. (R. 798.)

Mr. ARCHIE MCGOWAN, called as a witness for the plaintiff, testified in substance as follows:

I have never seen Cole Island all covered with water. (R. 1551.)

Dr. LLEWELLYN EUGENE HIBBARD, called as a witness for the plaintiff, testified in substance as follows:

Cole Island has not been an island for several years. It is a peninsula, but I have seen it there when it was an island. It has these crossing places on it that the water flows through from the westerly side to the east; it has channels through, and I have gone there when I would get my feet pretty wet if I wanted to get across from one side to the other; so it makes it an island part of the time of the year, but during the last half a dozen times I visited it I drove in dust to the extreme south shore. (R. 1606.)

Mr. BLACKMAR. Q. The vegetation at least on Cole Island indicates that it has never been covered with water?

A. Yes, sir; to me.

Q. And when you first saw it, it had the appearance of being a permanent island?

A. Yes, sir. It was an island at that time; and the water was quite deep the first time I visited there. (R. 1607.)

Cross-examination:

A settler cut hay on Cole Island; I do not know who it was, but I was told it was Mr. Dunn. I saw some hay there, but I never saw very much, although I saw a little hay in the stacks, and I was told that Mr. Dunn had put it up. (R. 1644.)

Mr. JOHN G. DARSEY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Do you know how much the highest point of this so-called Cole Island was above the water when you were in there hunting?

A. Well, no, I wouldn't venture to say how much higher it was, because frequently we would run in there, and we would find a little spot to get off on if there were ducks and geese flying over that particular point. We would look for what we called a bird trail; as a rule they will follow the same trail going to feed, and if you get on such a point you get good shooting, so that we weren't hunting grasses, and we weren't hunting vegetation, but just something to hide in so that we could shoot. (R. 1966.)

The tules made the best place to hide in. (R. 1967.)

Mr. GEORGE M. BENSON, called as a witness for the defendant, on cross-examination testified in substance as follows:

I have been familiar with Cole Island since 1909 practically at all seasons of the year. I have never seen it covered with water. (R. 2537.)

Redirect examination:

I have seen water pretty high on Cole Island. There are several portions of it I never saw water over.

Mr. LILJEQVIST. Q. When the water was up, Cole Island was in sequence, wasn't it, patch of tules here and then water, and then another patch?

A. Yes. (R. 2541.)

ff. 1910–1920

Mr. JOHN W. HEINZ, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I went with a fellow once through the channel between Cole Island and the peninsula with a row boat. (R. 1949.)

Mr. STANLEY G. JEWETT, called as a witness for the plaintiff, testified in substance as follows:

I have never seen Cole Island entirely covered with water. (R. 1996.)

gg. 1920–1931

Mr. STANLEY G. JEWETT, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I was at Cole Island either in late May or early June, 1922.

Mr. LILJEQVIST. Q. How much of Cole Island was sticking above the water?

A. We didn't land, but there was grass in sight back of the tules. (R. 2006.)

Mr. SAMUEL T. MOTHERSHEAD, called as a witness for the plaintiff, testified in substance as follows:

In the fall of 1921 I was a member of a kind of a peace committee which tried to settle this controversy. We visited Cole Island on that occasion; I went out there in an automobile; we went from here (Burns, Oregon) to the Narrows, as I recollect it (R. 2172) and went up south of the (Malheur) lake; then we went through Cole Island, through some fields there, but I do not know whose they were; then we went out as far as we could go in a car, and then came back around the east side of the lake. We got out (into the lake) several miles in the car; I do not know whether we got to the full extent of Cole Island or not, but we were out there several miles in the (Malheur) lake.

When we came out of the lake, we did not cross Pelican Island, we came back south of the (Malheur) lake, the way we went in, and then we went up on the east side (of Malheur Lake).

We covered a large portion of Cole Island in the automobile. (R. 2173.)

4. Other Islands

a. Elevations

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

On the island about half way between the north and south meander lines of the lake, south of sections 9 and 10, T. 26 S., R. 32 E., north

of the lake, on which we have indicated the house of Vickers and W. Huffman, there are seventy acres in an island; and the maximum elevation is 4,098 feet.

On an island extending westward from that island on which the houses indicated on the map as belonging to W. A. Campbell and Scott Haley are located, there are 52 acres above the 4,093 feet contour. (R. 98.)

Mr. EMIL BAKER, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I can not say exactly how high those islands would extend above the water, but what I would call those islands is in there (in the western half of Malheur Lake) where there would be channels of water going around; the water would all go around, and then be around in channels, probably. (R. 602.)

4. Other Islands

b. Areas

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

We have computed the total area of all the islands within the Neal meander line. Within that line and above 4,093 feet there are 12½ square miles, or 8,000 acres of that land. That includes Cole and Pelican Islands.

Aside from Cole and Pelican Island there are in the western end (of Malheur Lake) several islands or promontories, of which we have computed the areas. (R. 97.)

South of the meander line of section 2, T. 26 S., R. 32 E., extending in a general southerly direction, having a length of about three times its width, there is one island containing 140 acres.

Immediately south of that island there is another island containing 116 acres.

Between the meander line forming the south boundary of section 9 and part of section 10, T. 26 S., R. 32 E., and where there is indicated the Vickers house, about 10″ on the map (Plaintiff's Exhibit 3) south of the north meander line of the lake, there is one island containing 164 acres, and another one containing 56 acres.

On the island, about half way between the north and south meander lines of the lake, south of sections 9 and 10, T. 26 S., R. 32 E., north of (Malheur) lake, on which we have indicated on the map (Plaintiff's Exhibit 3) the houses of Vickers and W. Huffman, there is an island containing about 70 acres; and the maximum elevation is 4,098 feet. (R. 98.)

South of section 28, T. 25 S., R. 32½ E., lying generally south and easterly of the house indicated on the map (Plaintiff's Exhibit 3) as belonging to B. Ausmus, there is an island containing 440 acres. (R. 98.)

Southwest of section 25, T. 25 S., R. 32 E., there is another island containing 245 acres. That covers most of the large ones in the lake bed.

On an island extending westward from that island on which the houses indicated on the map as belonging to W. A. Campbell and Scott Haley are located, there are 52 acres above the 4,093 feet contour. (R. 98.)

In computing the areas I used 4,093 feet and took everything above that elevation. (R. 98–99.)

Mr. GEORGE E. WHITING, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Some of the lands on which the cabins were which we visited are not much more than an acre in extent, and others were larger. (R. 561.)

Mr. JAMES THOMAS BAKER, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Down along the other (west) end of the (Malheur) lake, there are some other islands down there that you recall that have some substantial size to them? (R. 575.)

A. Yes, sir; but I don't know that I could call any names off for those islands, but there are islands in there. (R. 576.)

Cross-examination:

Those islands in the western part of Malheur Lake would range in size from half a mile to three-quarters of a mile, or more than that; that is just guesswork on my part; I imagine there were three or four such islands in there of that size. I have not been on them in the springtime or during the summer, and I do not know what the condition would be at that time. (R. 582.)

Mr. EMIL BAKER, called as a witness for the plaintiff, testified in substance as follows:

In the western part of Malheur Lake, there are a good many islands which are tolerably good sized when the water is down; one or two of them would have an area of as much as one or two hundred acres, if not more; there were quite a number of them between one and two hundred acres. I have been on those islands in the winter for stock, and in the early days it was customary for cattle to feed on those islands in the winter. (R. 591–592.)

Cross-examination:

The place where there was about two hundred acres exposed when the water receded in Malheur Lake, is located west of the west fork of the Silvies River, in the center of Malheur Lake, or west of a line drawn north and south from the Blitzen River on the south side of Malheur Lake, north to the west fork of the Silvies River, on the north side of Malheur Lake. Mr. Darius Hynson (Rye) Smyth owns some of that land down in there and that is part of the land that I claim constituted the two hundred acres, maybe not two

hundred acres in that spot, but it was a good piece of ground. When the water is up, a great portion of it is covered with water. I do not know when I came to this country whether that whole thing was covered with water or not. I was not in there when I was twelve years old. That was after 1900 before I was in there. (R. 603.)

Mr. LESTER MARION HAMILTON, called as a witness for the plaintiff, testified in substance as follows:

In the west end of Malheur Lake, there are some islands, but I could not tell you a thing about the size of them. I only saw them one spring, and at other times since then occasionally, but not with the idea of ascertaining their extent. (R. 631.)

Mr. CAMPBELL C. KILBURN, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Did you know these men who have been mentioned here: Mr. Scott Haley, Red Campbell, Jason Bennett, Mr. Thomas, George Thompson, and Charlie Riley?

A. I know some of them.

Q. Do you recall now that in the eighties these men had cabins down there, or houses, and lived in them?

A. I knew Mr. Campbell and Mr. Haley lived down there somewhere, but at this time I don't know where Mr. Campbell lives, but Mr. Haley I do. In 1889, the fall of the year, we were gathering beef, and down toward the Sand Reef there was a great house standing on an island. There are lots of mirages in that country. There was a great house standing on an island that looked to be a mansion, and we rode through dry grass to get to that island, where years before we had gone through mud and mire for two or three miles and swam our horses to get to that island. The names of the other people I don't really know where they live; yet I do know where Scott Haley lived.

Q. And this mansion that you saw was Haley's?

A. No; that was not Haley. I don't know to this day who (R. 732) it belonged to, but there were different cabins scattered through the country there.

SPECIAL MASTER. That was the Mirage Hotel, was it not?

A. Probably. It was just a little cabin in there. (R. 733.)

Cross-examination:

The height of those islands (in Malheur Lake) above the water fluctuated somewhat. They would be (R. 743) a foot or two only above the water; others would probably not be that high. I call those islands in Malheur Lake that were surrounded by water, and the lands were never overflowed on top.

Mr. LILJEQVIST. Q. Were those places out in the tules covered when the water was up?

A. I don't believe they all were; no.

Q. That is the area I am talking about. In the wintertime when the water was at the very lowest, and you went on the ice, to what

extent was there any evidence of earth above the ice, and how high was it; how extensive?

A. Do you mean the island part, or where you broke through the ice?

Q. All through this marshy or tule country, or whatever you wish to call it.

A. There was no earth above, only where you came to these islands that were surrounded entirely by marsh or water.

The islands were not boggy, and they extended as I have said some two feet or more above the water; a dry place probably wouldn't be more than six (R. 744) inches above the water. I think those islands were the natural formation of the earth. Some of those islands would be an acre in area; as the ice disappeared in the spring, we could not get all of the cattle out sometimes, sometimes there was only half an acre, at other places maybe four or five acres. (R. 745.)

Mr. CLARENCE THOMAS CAREY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

There were tules and marsh grasses below my patented lands towards the lake.

(NOTE.—The description of this land as shown on Plaintiff's Exhibit 21 is the north half of the northeast quarter, and lots 2 to 10 inclusive of Section 19, T. 25 S., R. 33 E. The date of the patent indicated on the exhibit is March 5, 1906.—Pecore.)

Mr. BLACKMAR. Q. And where is it with reference to the Meldrum line?

Mr. PECORE. Part of it is above, and part of it is below. (R. 769.)

The WITNESS. I never did cut hay on there but I used it for pasture. There were only a couple of islands down south of this patented land. Just two small islands. (R. 772.) Most every year there was a little feed on them, even though it was very small. I do not suppose those islands were ten acres in the top of them. Those islands would be about six to eighteen inches above the water when the water was down. (R. 773.)

Mr. SIMON LEWIS, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. How far would the water come up on the land that you claimed. (R. 783.)

A. Well, there was a channel or two and the water would be in the channel; it would be over most of it, excepting one little island that it didn't go over. (R. 783–784.)

Mr. JOSEPH WARREN BUCHANAN, called as a witness for the plaintiff, testified in substance as follows:

There are a number of islands in the west end of Malheur Lake. From time to time I have been on those islands. Some years when we had wet years, the water would come pretty well up on those islands; other years when it was a drier year, of course, the water

was down lower. When we went hunting sometimes we would have to have high top gum boots on to get across between the islands, except in one or two of the channels that you couldn't get quite across with high top gum boots on. The boat that we used was just a little row boat. (R. 926.)

Cross-examination:

The islands that I have referred to are south of Mr. Hayes' place, and the George place; just little places where you have to wade across a little channel to get onto them; just a strip of land running in there with a channel in between; the strip of land was not running out from the mainland.

The islands were not very large, I never noticed the size, I was looking for ducks most of the time.

I could not say how many islands I saw there; those places would be an acre or two in extent. (R. 927.) Around the Adam George place there was a sand reef, around the north, and on the east; we usually did all our hunting there at the sand reef. That was at the edge of a small lake; at the north part and the east part. (R. 928.)

Mr. LeRoy Bunyard, called as a witness for the plaintiff, testified in substance as follows:

Mr. Blackmar. Q. Now, right in that particular section of the lake (where Mr. George Thompson, Mr. Scott Haley and Mr. Jason Bennett lived) and over west to the Narrows, there are a good many islands in there, aren't there?

A. There are a lot of islands when there is high water, and when we have not got high water, it is usually dry land, that is all dry. (R. 1153.)

Cross-examination:

Mr. Liljeqvist. Q. Through that tule area that you have described, you have (R. 1160) referred to, or the question was asked you, whether there were a lot of islands. What do you mean by islands?

A. Well, a piece of land surrounded by water is the best way I would describe it. (R. 1161.)

The only real islands are in the western end of Malheur Lake, around toward the Narrows; when there was high water there were a lot of islands in there; when the water was down, there were no islands. When we went from the Thompson place down toward the Narrows, we did not go through that outer strip of a couple of miles, we went around there looking from the water line and across in there by the Haley place; that is where we went to go to the Narrows; we went through a considerable lot of water around that way and a lot of islands in there. (R. 1161.) The islands varied in area from one acre to probably ten acres, or something like that; there were no tules on top of them, but there were tules growing on the edge lower down the water line. (R. 1162.)

Mr. MARCELLUS B. HAYES, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Out to the southwest of your place (within the Malheur Lake) in the normal high-water period, there were all kinds of channels and open places through those tules.

A. There are channels and islands all through that country there. Some of those islands have 100 acres, and greasewood and knolls eight or ten feet high. There are not so many of them and that land is pretty much all deeded. (R. 1224.)

Mr. CHARLES SUMNER JOHNSON, called as a witness for the plaintiff, testified in substance as follows:

I came from California and settled at the rock ford in 1887; then in 1892 I moved down to the north side of Malheur Lake about 4½ to 5 miles from the Narrows. (R. 1249.) We were not on deeded land; there were no deeds to it then. This place was situated a little east of Scott Haley's place. I do not think my place was known there in the community by any particular name; it joined Simon Lewis' on the east, my place ran up farther north than his property. I think I was the first one to claim the land.

I was not there when Mr. Neal ran his meander line because I only lived there until 1894. (R. 1250.)

I moved a little cabin on to that place that I had at the rock ford. I was married at that time and had a family and they moved down there with me. To get the cabin down from the rock ford to this place (on the north side of Malheur Lake) I towed it down, put it on a wagon and hauled it around Mud Lake and across there and also across the Narrows that was before the bridge was built there (R. 1251–1252); and took it right up there (on the north side of Malheur Lake). I do not think it was dry between Mud Lake and the reef at the time. I took that cabin up through there; we came right through there; we did not get stuck in the mud and had no trouble getting through to this place (on the north side of the lake.) (R. 1251.)

I also built a little stable there for the horses and a corral for the cows. (R. 1251.)

I did not have any machinery. I had a wagon. (R. 1252.)

At the place where I settled in 1892, on the north side of Malheur Lake a little east of Scott Haley's place and east and north but adjoining the Simon Lewis place (R. 1250) there were several islands out in what they called (Malheur) Lake. (R. 1252.)

I put up a little fence on one side of my place. (R. 1252.)

I do not know that the island that I cut the hay on was named; it was a smaller island down farther toward the Narrows, not a very big one that we first cut hay on; we (put) in a small stack of hay. The next year some settler came in and took (possession of) that one (island); and after that one was taken, the next year we cut on an island further east, a larger island. I do not know how

many acres there were to it. It was called the Red Campbell Island; he had a claim on it I think.

We crossed straight there from my place on to the Red Campbell Island; we struck the west end of that island. He was a little farther east than where we cut hay. (R. 1253.)

We stacked the hay we cut on the island first until the lake froze up and then we hauled it out on the ice by team. (R. 1254.)

I have not been around on any of the other islands in that particular part, just been on the two.

Mr. BLACKMAR. Q. The two of them and the one you lived on?

A. Yes.

Q. Did you call the place you lived on an island?

A. An island? No; it was not all surrounded by water when I went there. When I left it was. (R. 1254.)

I moved out of there about August, 1894.

The water was pretty high that year and it got all around our house. It was possibly three to four feet, or something like that, away from the floor of the house.

When we moved out we moved by team out of there and drove right out across to the dry land; we had to drive possibly a quarter of a mile to get to the dry land. Our horses did not get stuck; just came right along. (R. 1255.)

Cross-examination:

The place that I had joined Simon Lewis' place, and he was there at that time. (R. 1255.)

I do not think Simon Lewis' property was surveyed land at that time.

(NOTE.—Simon Lewis' place—it is the same property. It lies just east of the Scott Haley place, and he (Mr. Johnson) said he was east of the Simon Lewis place and a little east of Scott Haley's. The Simon Lewis place embraces lots 1, 2 and 3 of Section 17, T. 26 S., R. 32 E., north of the lake. I have not been able to (R. 1256) absolutely identify Mr. Johnson's place. I have described the patented Simon Lewis land.—Pecore.) (R. 1256.)

The WITNESS. My place joined Simon Lewis' place. When I went there he had a cabin on his place which he lived in. It was hardly a quarter of a mile easterly of his cabin to my place.

I think Mr. Lewis' cabin was on the highest point on his land.

When I went there in August, 1892, at that time it was the dry part of the year. That year I did not have to cross any water to get to where I lived. I put in my cabin there. (R. 1257.) I do not know whether my place was surrounded by water in the spring following the time I went there (in 1892) or that it was in the spring after that (1893); but in the spring of the year that I left there, 1894, the water was on it. In the spring of 1894, the year I left, there was not much of my place above water. I left there in

August, 1894. When I left in August, 1894, I do not think there was much water around my place, but there had been in the spring of that year.

When I moved out of my place, I went to the dry land before I got to Simon Lewis' place. (R. 1258–1259.)

The other island that I cut some hay on was southwest from my place, about a couple of miles. I am referring to the first island that I cut some hay on. I think a man by the name of Jim Ladey and a Mr. Riley lived in there. I do not know who subsequently got possession of that place. (R. 1259.) It is not the place that Red Campbell had.

The other island I have referred to is the Red Campbell Island. (R. 1259.) The Red Campbell Island was about a mile and a half to two miles a little east and south of my place. We did not use a boat when we went out to those islands to put up hay, and I did not bring the hay back in a boat. We stacked it over there and I hauled my part out on a wagon in the wintertime, when it was froze up. Going through there there were a lot of tules more or less in those days. There was some open land and open water between the tules.

Mr. LILJEQVIST. Q. Most of these things that are called islands in there were nothing but tule patches, weren't they?

A. Well, they did not grow much tules on them, mostly grass.

The places that I cut my grass on were a little above the water; they were about three or four feet above the water in the spring, I guess. (R. 1260.)

The last island we cut hay on I do not think was ever flooded all over. The first one down there might have been, that small island.

Mr. LILJEQVIST. Q. What I was getting at is this: The hay you cut on that island was that hay grown by flood water or by sub-irrigation?

A. Mostly flood.

Q. Flood?

A. Yes.

Q. The nature of that grass was that it required water to stand on top of it in order to raise crops?

A. To grow to amount to anything, to make the crop it did, but to grow a light crop of hay (R. 1261)——

Q. (Interrupting.) Let me put it this way: What is your best judgment as to the places you cut hay: Did water rise over them and flood them in the springtime in order to get this crop you did cut?

A. Yes, sir. (R. 1261.)

Mr. JESSE O. ALBERSON, called as a witness for the plaintiff, testified in substance as follows:

The George Thompson place (R. 1271) was up on an island, on which I cut hay for two years, 1898 and 1899. (R. 1272.)

Cross-examination:

There was a small island there at the George Thompson place, and it may have been about 100 acres in area. (R. 1277.)

Mr. EDWARD ANDERSON, called as a witness for the plaintiff, testified in substance as follows:

At one particular time, really the first, I went across to the island where Campbell had his place. That was in the spring of about 1906. (R. 1285.)

Cross-examination:

Mr. LILJEQVIST. Q. Now, you said you went out there one time onto an island. The Red Campbell Island, did you say?

A. Yes.

It is north of the Reed place, but I do not know the exact distance.

Mr. LILJEQVIST. Have you any way of determining that distance, the Red Campbell Island, Mr. Pecore?

(Mr. Pecore indicates on map.)

Mr. LILJEQVIST. Mr. Pecore identifies the W. A. Campbell place. The house is on it now.

SPECIAL MASTER. That is what is called Red Campbell Island.

Mr. LILJEQVIST. That is about two miles northwesterly (R. 1288) of the Reed place?

A. Something like that.

I went out there on foot; I did not have to follow any high places; probably waded through the water. I think that was along about April or May, in the spring of 1906. I do not think that was a late season that spring, I think the water had come in; some of it was coming in. (R. 1289.)

Mr. LILJEQVIST. Q. Did you see that place where you could go with rowboats between those two places you went that way, the channel?

A. Yes.

Q. Where was this channel that went between the Narrows—between the Campbell place and the Reed place you went over?

A. There was one pretty good channel in the Reed place in early days. (R. 1289.)

It was a pretty good channel then. I think the channels had a tendency to fill in with silt as the years went by. (R. 1290.)

Mr. PAUL WARE, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Along about 1900 that one spring we had high water and we rowed up there toward Scott Haley's place. I think we camped on a little ridge that time, which was termed as an island, and a fellow lived there whom we call Pinto Tom, and we camped there two weeks. I can not tell you the exact date or what year it was, but it was about 1899 and 1900. (R. 1330–1331.)

Mr. WILLIAM HANLEY, called as a witness for the plaintiff, testified in substance as follows:

I knew there were islands out in the lake, but I did not know much about them because they were not cattle range, usable islands, in that they did not have pasture on them. They were not open for cattle to go on to them. All that upper end of the island when we came was pretty well a swamp island country. The contour of what you would call the little islands was very rough. There is a contour map of it that probably should be in this case to kind of give you information which was taken at the time of the water adjudication. There is another copy of it in the Silvies-Harney Valley Irrigation District. (R. 1352.)

In the early days when I went in there, in the west end of Malheur Lake, there were a good many islands that had grasses on them. (R. 1353.)

Mr. BLACKMAR. Q. These islands down there in the west end of Malheur Lake, what character of grass grew upon them?

Mr. LILJEQVIST. Are you talking about down below the Neal meander line?

A. Down below the Neal meander line.

Mr. BLACKMAR. That is what he is talking about.

A. I was in that country in the fall of 1880, looking for lost cattle, and I camped at the old Sodhouse probably for a week; there were a couple of boys with me, and we put our horses up on the head of an island that is commonly now called the Bull Field. (R. 1354.)

Cross-examination:

Mr. LILJEQVIST. Q. Can you tell me where any particular island, as you call it, was located?

A. Well, the main thing that we knew was a difference in the soils, between a black soil and a grassed-over soil. Now, the black soil we didn't consider it, but whenever you got into a black soil you would go clear down with your horse, and you remembered that soil. (R. 1393.)

Mr. SIDNEY COMEGYS, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Have any of these things that have been referred to, as we have listened here for two weeks about islands in this western part (of Malheur Lake), any comparison at all with Pelican Island as you knew it from the earliest time you ever saw it?

A. Well, that country west of Malheur Lake always looked to me like a swamp country, and it was little knolls and little islands all around through it.

Q. All right. Now, let me ask you this:

Do you remember that through that entire area there were a great many places where there were tule islands floating in the water,

and if you stepped on them they would go down like stepping on a raft?

A. No, I wasn't out very far north there.

Q. In your trapping, didn't you go across these floating islands?

A. I didn't trap. I went out with this fellow that did.

Q. Do you mean to say you don't know anything about the (R. 1462) floating islands?

A. No, I never went out on the floating islands much out north of where I lived.

Q. You knew from time immemorial, from common knowledge of the country, there were all kinds of floating islands in that lake, is that correct? (R. 1463.)

A. I don't know whether it was correct or not.

Q. You don't know about it?

A. I wasn't out on the lake very far. (R. 1463.)

Mr. ORA WINFIELD HILL, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

As well as I remember Cane Island was a mile or a mile and a half east or a little southeast of the Showen place. It was quite a while ago when I was there, and I may be mistaken, but it was in an easterly direction of the Showen place, but I can not say how far. (R. 1547.) I do not know whether it was off the mouth of the Silvies River. I do not know whether cane grows only in water.

Mr. LILJEQVIST. Q. Now, isn't it a fact this meander line on the south side of the Ruh place was covered with water very, very often?

A. Why I would think the water would get up over it.

Q. Didn't the water back up in the spring around the meander line, and around that Ruh place?

A. It would in places, and in other places probably the meander line would cut over a ridge and it wouldn't.

Q. I have an affidavit in my grip by Ruh, before he died, telling me that the water stood from a foot to four feet on his meander line. Now, what is your judgment as to that? Is that correct or incorrect?

A. I believe that would be correct in places.

Q. What do you mean by places?

A. There are some places on these ranches, low places where (R. 1548) the meander line would cut through, and it may have been a foot or three feet there. (R. 1549.)

I went in there (on the Showen place) in 1894. I suppose 1894 was a wet year.

Mr. LILJEQVIST. Q. Didn't the water go back beyond the meander line in that spring of 1894?

A. North of it?

Q. Yes.

A. Well, I don't know whether you would call it from the (Malheur) lake back-up, or the overflow from the river; but it must have come from the Silvies River.

I lived there (on the Showen place) four or five years.

The water came up so that it surrounded the Thompson place.

The water came up to the Showen place. The Showen place was practically covered with water. I do not know, but I should judge that eight or ten acres of the Thompson place was above water in the springtime. It was just a long ridge that would be above water. (R. 1549.)

Mr. ARCHIE MCGOWAN, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. And these things they call islands on the western part of the (Malheur) lake were islands of how big a space?

A. Well, they varied quite a good deal. There are some pretty good islands in there. I would say there were areas in there that had anywhere from 20 to 100 acres in them.

I would say there are islands in there that were pretty good-sized islands. (R. 1569.)

I could not tell you how big those islands were at high water. (R. 1570.)

Dr. LLEWELLYN EUGENE HIBBARD, called as a witness for the plaintiff, testified in substance as follows:

I am not familiar with any islands by the name of Dunn Islands, but I might be able to place them should they be described to me.

SPECIAL MASTER. They are, in effect, a prolongation of Cole Island.

Mr. PECORE. On the south end.

I passed them in getting down to them, but I didn't know them by that name.

(Mr. PECORE. The reason we did not show Dunn Island (on Plaintiff's Exhibit 3), your Honor, was because I could not find where Cole Island ended and where Dunn Island began.)

Mr. BLACKMAR. Q. Now, directing your attention to the westerly portion of Malheur Lake, say from a line drawn about at the mouth of the Silvies River, were there a good many islands (R. 1607) in that territory, or in that part of the lake?

A. Not very many that I would consider real islands. There are a great many places where a little soil will stick out, and there are a few real islands which show that they have not often, if ever, been covered, like the one that extends out from Johnny Graves'. There is a high ridge, and half the time it has been an island, and half the time a peninsula, and it shows that rarely, if ever, it has been covered with water. And then there are hundreds that sometimes a little ground projects from, and sometimes they look like islands; and vast numbers of them (R. 1608), hundreds of them, if you go to make a landing on them, you will find there is water underneath. There is a floating lot of vegetation and tules, and it will hold the birds up, but if you step on it you will sink in to this depth.

It would be from a foot to two feet deep under this tule bed that the birds nested on. (R. 1608.)

Mr. BLACKMAR. Q. Now, these places (in the west half of Malheur Lake) where they cut hay, and where these men had houses and cabins, was there any appearance of permanency of the land around those places that you saw?

A. Yes, sir. As far as I observed, nearly all of these cabins I saw placed down there were placed as if, and it had the appearance of the water not ever going to that particular spot. Sometimes it was a large body or grant, and sometimes it was very small, and it appeared to be above where the water would ever destroy it. I felt that that particular place stood out of the water, and that they had placed their cabins in that place. (R. 1611.)

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Did these islands which I have referred to in here south of the Otley homestead and the Catterson homestead, did they have the appearance of being permanent islands, the ones to which I have referred?

A. Yes; they were permanent islands, those little places; they were small, those places were. Pelican Island was the largest.

Q. And Cole Island the next?

A. Cole Island the next; and Cane Island. (R. 1649.)

I do not think I have ever heard of an island referred to south of Cole Island called Dunn Island; there is a place in there where Dunn cut hay, but I don't think I have ever heard that called Dunn Island.

Mr. BLACKMAR. Q. Now, take this section of the Malheur Lake down here toward the Narrows: Are there a good many islands in there?

A. There is high places all through there, all over.

Q. These islands which I have just referred to down there in the west end, about the time that you came here, there were some homesteads built up there, were there not?

A. Well, after I came here a short time, a year or two, some homesteads went in there. People went in about the Sodhouse and built in there, and around the south side, and there are quite a few people who moved around in there, yes.

Q. And in those days they cut hay up there?

A. Yes; cut hay. They would cut hay there in the summertime, late in the summer, and in the springtime—they would feed their (R. 1650) cattle, and in the springtime they would have to move out on account of the high water, a lot of them there. (R. 1650.)

Mr. JAMES A. TURNER, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I do not know how big the island was that I had my house on; I never measured it; it was probably a quarter of a mile wide, and probably a half or three-quarters of a mile long.

I never did see that island covered up entirely with water; I have not seen it practically covered up; I have seen it from where my house stood down to the sand reef; I have seen the water come through there probably in a place.

I would not call the Sand Reef I am talking about an island, because the water went dry between the sand reef and north of it. (R. 1727.)

The Sand Reef was unsurveyed land.

I was there from 1894 to 1895, just two years, and then I left. I think somebody else has moved back on that island. I do not know whether there is anyone on there today, or who was for the last ten years. Ausmus has got it now. I do not know how long he has been holding it. I was out there this summer and he was stacking hay on it, and he had what you might call tent houses which I saw there.

I never have seen any summer like this in the days that I was in there (on my place). (R. 1728.)

Mr. MAURICE FITZGERALD, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I did not notice any ground projecting above the ice except those places in the tules I told you of. I did not see any islands. There may have been islands in the lake, but I did not see them if there were. (R. 1799.)

Mr. THOMAS T. DUNN, called as a witness for the plaintiff, testified in substance as follows:

My house is on deeded land. My father started to build the frame of a house on Dunn Island and it stood there for many years. When he put that little frame of the house there, it was in the nineties, sometime, but I do not remember just when. I remember the house stood there, what was left of it, for many years.

Mr. BLACKMAR. Q. This island they call Dunn Island is kind of a continuation of Cole Island?

A. Yes.

I have been out to Dunn Island a good many times.

I have not seen the lake so high that it covered Dunn Island entirely. (R. 1820.)

My father never completed that house down there on Dunn Island; just the frame of the house is all. (R. 1821.)

Mr. LLOYD B. CULP, called as a witness for the plaintiff, testified in substance as follows:

I do not believe I know Cane Island. I was hunting down there and I was either on Cole or Cane Island. I camped a day or two and I don't know which one I was on. I am not very well acquainted down there with the lay of the country. (R. 1850.)

Mr. JEFF CAWLFIELD, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Do you remember some islands northwest—from the north end of Cole Island, some small islands up in there?

A. Yes; there are islands in there. (R. 1892.)

Cross-examination:

The other islands I was talking about northwest of Cole Island, were just little knolls; I don't suppose they are much islands, but there are knolls all over the (Malheur) lake; on the north side there were knolls.

Mr. LILJEQVIST. Q. Way up to the north, do you mean?

A. Yes.

SPECIAL MASTER. Mr. Liljeqvist wants to know if there is any island up there comparable in size to Pelican Island.

A. No; there is not.

Mr. LILJEQVIST. Q. In appearance, inside the lake?

A. No; there is not.

Q. Anything called islands in that north part of the lake were nothing but tule patches?

A. No; there was knolls; nothing growed I think, just salt (R. 1894) grass, and greasewood, but there wasn't no names for them.

In the springtime there would be quite a bit of those knolls on the north side (of Malheur Lake) that would be sticking above the water. I don't know how many acres. (R. 1895.)

Mr. JESSE FARRIER, called as a witness for the plaintiff, testified in substance as follows:

I would not say how many acres there are there on that island (south of the Ausmus place) (R. 1927), because I never measured it. I know it was over five acres, anyhow. (R. 1928.)

Cross-examination:

Mr. LILJEQVIST. Q. You said you were on an island south of Ausmus' place. Was Ausmus' place on patented land?

A. Well, I understood that part of it was patented, and the rest wasn't.

I do not know exactly where that is located. (R. 1928.)

I know where the Otley place is. It (the island) is kind of east and south of the Otley place, I think.

Mr. Ausmus had a cabin there. I stayed with him in 1903, 1905, 1906, and 1907. That was 24 years ago.

I think that the island would be in a kind of a southeasterly direction from the Ausmus place; a little south of east.

I can not tell the area of the island when the high water was on it, because I was never there then. At the lowest part of the year, I should judge there was about 35 acres, something like that (to the island). The five acre area that I said was island was when there was high water. (R. 1929.)

It was five acres more or less; I don't know just exactly. (R. 1930.)

There was nobody else settled on that land (the island) (R. 1930) that I know of; after I was there. Mr. Ben Ausmus has got it yet as far as I know. (R. 1930.)

Mr. JOHN W. HEINZ, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Did you become pretty well acquainted with the islands in that lake?

A. Well, I did around my territory where I was trapping. There were no islands, you might say, where I was down in there trapping. I do not know anything about any islands west of Cole Island. I never was down that side of the (Malheur) lake, except Cole Island. We ran a boat over to Cole Island a couple of times.

I know where the Ausmus place is (R. 1943), but we never trapped in there—well I trapped one year down there with Archie Gibson with a rowboat. There might be some islands in there, but I do not recall them now. Sometimes if the water was low, there were islands in there; and if it was high water, there were no islands. When we were trapping in there, I believe there were a few little knolls stuck up in there. I do not remember any greasewood being on any of them. (R. 1944.)

Mr. JOHN G. DARSEY, called as a witness for the plaintiff, on redirect examination testified in substance as follows:

I never saw a chimney on an island down there (in Malheur Lake). The only shack I saw down there in Malheur Lake was Archie Gibson's shack right at the edge; in the early spring, the water ran around there and we called it an island because there was a slough that ran down there and cut his cabin off from the mainland; but in the fall of the year it was dry out to his cabin, there was a good road out there.

I do not know where Archie Gibson's place was located; I should judge it was maybe a mile south of Saddle Butte; that is the only way I could describe it, I do not know the numbers of it; I would not say exactly a mile, but about that. (R. 1968.)

Mr. STANLEY G. JEWETT, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Now, with reference to this Cane Island. I would like to get that identified, and see if it has blown away, or been washed away, or what has happened to it; I can't find out much about it; I don't see it on this map. Can you locate it on this map, Plaintiff's Exhibit 3?

I think this elevation on the map (Plaintiff's Exhibit 3) to be what I call (R. 2005) Cane Island, and which I visited. [Indicating.]

SPECIAL MASTER. Now, can it be identified on the map?

A. Apparently it is about two miles from the north end of Cole Island where I started across the swamp.

Mr. LILJEQVIST. A mile and a half of B. Ausmus house shown on the map, in the south part of Section 28, Township 25 South, Range 32½ East, north of the lake.

A. Yes.

The area is probably four or five acres.

I should judge greasewood covered approximately one acre. (R. 2006.)

Mr. ALVA SPRINGER, called as a witness for the plaintiff, testified in substance as follows:

In addition to Cole and Pelican Islands there are also other islands that were not covered in the high water of 1894.

SPECIAL MASTER. Then you mean, Mr. Springer, they never were covered because 1894 was the highest water you knew?

A. I meant to say they were never covered since I knew the country, and that was '88. As to what they were before that, why I don't know.

I have not heard of an island called Cane Island. There used to be a little patch of cane way on the north end of Cole Island; but I never heard it referred to as Cane Island. (R. 2021.)

Mr. ALFRED L. MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

Dunn Island is a continuation of Cole Island the way I understand it.

I have helped cut hay on Dunn Island. I have seen other years when people cut hay there; I saw lots of years they had hay in there, cut hay and stacked it and fed it out. (R. 2073.)

Mr. JOE ORMAND AUSMUS, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Some of the witnesses have referred to an island called Cane Island. Do you know of such an island in there? (R. 2132.)

A. There is a high ridge on the lower part of our field that we always called Cane Island; it was commonly called Cane Island.

With reference to Cole Island, it is located north and a little west; and there is a little cane on Cole Island, too. (R. 2133.)

Recross examination:

There is a little slough that cuts Cane Island off when the water is high; just a little slough.

Mr. LILJEQVIST. Q. Isn't it a fact people have gone across that entire area in a boat from Cane Island to the channel since you have been there?

A. I think that was during the flood season when the water was coming from above.

The spring and the early summer is the flood season; it lasts perhaps two or three months. (R. 2138.)

I have never seen Cane Island under water since I have been there. Cane Island is considerable above (the water); there is a high ridge there. Cane Island is much higher than the water.

Mr. LILJEQVIST. Q. How big an area in acres is exposed when the water is in there in the spring?

A. In that one tract there is about between 82 and 100 acres; and then there are other parts of the ridge that is just cut off by a slough, and that is always out of water. There is considerable land down there that is out of water. (R. 2140.)

Mr. RUBIN T. HUGHET, called as a witness for the plaintiff, testified in substance as follows:

I heard considerable testimony here, Mr. Blackmar, and I have heard references to Cole Island and Dunn Island. Now, my conception of those islands is, there were two separate elevations; that is, they were not the same formation, because near the shallow end of Dunn Island is a channel there through which the waters flowed and filled up this small lake which extended southward. I have heard it named the Dunn Lake; but I did not know that it was called Dunn Lake until then. (R. 2187.)

Mr. BLACKMAR. Q. Some of the witnesses also mentioned an island which is apparently west of the north end of Cole Island, which they described as Cane Island. Do you recall that island up in there? Was it known to you as Cane Island?

A. That is a continuation, or rather the northern extremity of Cole Island; and my recollection is that when I first heard of that island, and first saw it, it was called Cane Island. (R. 2193.)

Mr. JOHN MARSHALL, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Now, in these wet years when you got up on a point, how did Malheur Lake look?

A. Well, it looked like a solid body of water, with the exception of the tule islands, the islands that were around over it. (R. 2243.)

Mr. ALPHENA VENATOR, called as a witness for the plaintiff, testified in substance as follows:

With reference to those six years, 1872 to 1878, as to whether there were any islands, or high places, or ridges in the west part of Malheur Lake, or west of a line running north and south through the Sodhouse, the winter of 1872 to 1873 was a very hard winter; the snow was very deep; we had settled there (about where the cookhouse stands now on the Island Ranch), brought out cattle from Goose Lake Valley; during the latter part of the winter we ran out of hay, drifted our cattle down into the tules on to what was practically the north side, you might say, of Malheur Lake, or the tule

ridge down where the settlers are, and they gradually worked on out.

The Smyths, the Weavers, and I think Dan Wheeler, were located out where John Jenkins is now; John Miller lived farther around this way; my impression is that he lived about where the Warm Springs is, about where the saw mill is now (about three miles from Burns). The Smyths lived right here some place too, but I don't just know where. They all got out of hay and drifted their cattle down over the islands and used to stop at our house, and you might say the cattle all went in together.

The general report was that the islands were flooded; and the next (R. 2317) spring, 1873, we had taken our cattle out down around what is called Pelican Island and Saddle Butte (R. 2318) and drifted them out that way. My impression is it was about March; it was not early break-up. Naturally part of our cattle went through with the other cattle to the south side of the (Malheur) lake, where Smyth and the other peoples' drifted out. We camped at the Warm Springs, that is where (Ralph) Catterson has a dance hall and a bath house now, down towards Crane, Oregon. Later on we came back to the island. It didn't overflow. (R. 2318.)

c. Vegetation

aa. In the Early Days

Mr. FRANK WHITING, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

There are small islands (in the western half of Malheur Lake) having greasewood and salt grass on them. Salt grass and greasewood do not grow in the water. I can not say how many of those islands there were. (R. 207.)

I have seen small places that you would call an island with some greasewood on it and some salt grass. (R. 207–208.) Those islands extended a foot or a foot and a half, something like that, above the normal stage of water. I have never seen them covered at ordinary high water, as I was not out there in the high water. I was only out there in the wintertime at the close of the dry period of the year and the islands were dry and the tules were dry. That was not in the fall of the year. In fact, that is what has happened to the tules, they have dried out and blown away. Those tules were as high as your head in the early days. You could ride out on horseback and you could not see a man's head when you were on horseback in the tules. (R. 208.)

Mr. DARIUS HYNSON SMYTH, called as a witness for the plaintiff, testified in substance as follows:

The island ridges down in Malheur Lake had all kinds of wild grasses and sweet grasses growing on them. (R. 460–461.)

Mr. GEORGE E. WHITING, called as a witness for the plaintiff, testified in substance as follows:

In the early spring shortly after the ice broke up I went in a small skiff or rowboat out into Malheur Lake; do not know the exact place, but it was on the north side of the lake east of the Narrows. There was a party there by the name of Adams, and I was down there. We had taken a house on a wagon and moved it from Burns down there before the ground thawed out; the lake would freeze at nights enough to carry the wagon; I went down there; that was the time I went in the boat around it. He (Adams) rode around there, it was kind of tule, visiting neighbors out on those islands, and I thought, what could a man do sticking around, just where he had building room on those places just like a rat. These islands where I visited these people were north and west of the Sodhouse, and across Malheur Lake on the other side, east and west of where the Narrows is to-day. (R. 553.) I suppose there were a good many islands there; there were a number of promontories, where the water was all around them at that time, and where these people had their houses. Around their houses was salt grass on the high places, which in later years they cut for hay, but not at that time, because it was a new settlement. I was not so very familiar with it after that. (R. 554.)

Cross-examination:

The islands with the cabins on (in the west half of Malheur Lake) had a little salt grass on top of them (R. 561); most of them were salt grass knolls (R. 563); did not see any sagebrush or greasewood on them that I remember of (R. 564–565); possibly immediately around the edges of the islands there were some tules; we passed through tules (R. 565); those islands extended probably a foot or a foot and a half above the water; those lands and those islands have a gradual slope, sloping quite a bit towards the water. (R. 564.)

Mr. EMIL BAKER, called as a witness for the plaintiff, testified in substance as follows:

There are a good many islands in the western half of Malheur Lake upon which there is salt grass, and other grasses. (R. 591–592.) I have been on those islands in the wintertime with stock; and it was customary in the early days to feed the cattle on those islands in the winter. (R. 592.)

Cross-examination:

I know of several places (or islands) of one hundred acres located from the Sodhouse down toward the Narrows.

Mr. LILJEQVIST. Q. And when you refer to that, you are referring to a little place when the water is down it shows grass above the water?

A. Yes, sir.

Q. And they cut hay on that place?

A. Yes, sir.

I do not believe I have ever seen any greasewood or sagebrush on those places.

Mr. LILJEQVIST. Q. And on the little bit higher places, you would find a little salt grass?

A. Yes; some salt grass.

Salt grass springs up when the water recedes. (R. 604.)

Mrs. OLLIE DARSEY, called as a witness for the plaintiff, testified in substance as follows:

I have been in Malheur Lake where some of those islands were, but I do not know which islands or what they call them; there is a good many tules in there around those islands. (R. 656.)

bb. 1870–1880

Mr. MAURICE FITZGERALD, called as a witness for the plaintiff, testified in substance as follows:

I was around the north and west end (of Malheur Lake) a good deal in the tule region; that was from 1877 until 1882 and for a great many years afterwards.

The greater part of the west and southwest end (of Malheur Lake) was a tule marsh, but occasionally there were patches of greasewood and sagebrush around that were elevated a foot or two, maybe more sometimes, higher than the surrounding tule land, and you found them, you might call them islands in the tules, but they were that way when there was no water around the tules either. At times in the year it was pretty dry in a portion of the tules in the fall of the year.

In those days those islands had salt grass and greasewood on them, and sometimes sagebrush too. I think there was some sugar grass on them, but I am not exactly sure.

Cattle followed their own bent. They went into those tules when the storms came, and they found food and shelter in the tules, and wintered pretty well most winters without being fed. (R. 1786.)

Cross-examination:

Mr. LILJEQVIST. Q. Are you sure you saw sagebrush anywhere in the western half of the lake where the tules were?

A. I saw sagebrush at places in the tules. I didn't say in the lake. I said in the tules.

Q. That is around the lake? (R. 1789.)

A. Around the lake, yes. And there would be raises and patches of ground in the tules—there might be an acre or two at a time—and tules would be around north, south, east, and west of the patches.

That was around the edge of the lake (R. 1798) and away from the lake. It was not in the lake, but in the tules. I never crossed

through the lake or water going around that way. I was on dry land most of the time. There were a few places soft, low places or sloughs, or something, where it would be soft; most of the road was solid.

I did not notice any ground projecting above the ice, except those places in the tules I told you of. I did not see any islands. There may have been islands in the lake, but I did not see them if there were. (R. 1799.)

Mr. ALPHENA VENATOR, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. In 1872, when these cattle drifted in, were there any islands, or ridges, in the west end of the present (Lake Malheur) Bird Reserve which were covered with grass?

A. Yes, sir.

To my remembrance, it was grass about the same as would be in a protected region: Sugar grass of various kinds, and salt grass and weeds, and so forth. The cattle wintered there well.

Mr. BLACKMAR. Q. On any of these islands in the western part of the lake (Malheur), that part of the lake which would lie west along a line drawn north and south through the Sodhouse, did you see any sagebrush, or greasewood? (R. 2318.)

A. That winter, my brother-in-law had his cattle to the west of Wright's Point, and down through and toward what is Swan Lake now, and I wasn't in that country much that winter. (R. 2318-2319.)

Q. At that time, between 1872 and 1878, were you in the territory which I described as west of a line drawn north and south through the Sodhouse?

A. Will you please show me that line?

Q. Here is the Sodhouse.

[Mr. Blackmar indicating to witness on map.]

A. Where is the Island Ranch?

Q. The Island Ranch is up here. [Indicating to witness on map.] (R. 2319.)

A. And the white house?

Mr. PECORE. It is west of you. I think the house on the Island Ranch is about six miles north of this point, as I remember it. [Mr. Pecore indicating to witness on map.]

A. Yes. (R. 2319.)

Mr. BLACKMAR. Q. Now, what I want to know is whether or not in that part of the Bird Reserve, or the lake, whether or not there were any islands in there which were covered with salt grass?

A. Between 1872 and 1878?

Q. Yes.

A. Yes, sir.

Q. And did you feed cattle in there?

A. No, sir.

Q. Well, did you go in there after cattle?

A. Yes, sir; I rode with my brother-in-law and my sister.

I have been in that same section (of Malheur Lake) since 1884 down to the present time. (R. 2320.)

Mr. BLACKMAR. Q. Is there any difference between the islands as they appeared to you from 1872 until 1878, and as they appear to you at the present time with reference to location, and also as to vegetation?

A. It is drier now.

Q. What I want to know is the difference, if any exists, between the islands as they were in the early days and as they are to-day?

A. The vegetation might be the same in wet years, but the vegetation isn't near so great. (R. 2320.)

cc. 1880–1890

Mr. JAMES THOMAS BAKER, called as a witness for the plaintiff, testified in substance as follows:

The cattle go down into Malheur Lake in the wintertime; they drift in; do not have to drive them in; (R. 573–574) they feed principally on the grasses on the islands.

Mr. BLACKMAR. Q. Are the grasses that the cattle eat through the winter down there on the islands?

A. Well, not altogether. It freezes up, and there is other grasses along the tules—smaller tules that they eat, and they don't have to get onto the islands to find themselves feed.

Q. But there is grass on a good many islands down there on the lake?

A. Yes, there is. There are quite a few islands along in there. (R. 575.)

On all of those islands that amount to anything, or are of any size, have greasewood on them. (R. 577.)

Cross-examination:

The islands that I have testified about apparently have just a slight elevation above the water; there was salt grass and wire grass growing mostly on those islands. I am now talking about those islands on the western part of Malheur Lake. (R. 581–582.)

Mr. GRANT THOMPSON, called as a witness for the plaintiff, testified in substance as follows:

There are islands in the west section of Malheur Lake, with salt grass on, but there are no tules where the salt grass is; in the winter the cattle feed on the salt grass on those islands. (R. 708.)

When I first went down in that country around Malheur Lake, I remember a number of men who had cabins, or houses, out in the lake bed below the Neal meander line.

I remember Scott Haley's place.

Mr. BLACKMAR. Q. When you first came there, did he have a cabin?

A. Scott was pretty well on the west side of the lake. You are speaking of the east side. I am not so familiar with the west although I know a good many of those people in there.

Q. What I am asking you is: When you went in there, did Scott Haley have a cabin down there?

A. Yes, sir.

(NOTE.—Scott Haley's cabin is about six inches on the map, Plaintiff's Exhibit No. 3, almost straight north of the north end of the north and south center line of section 29, T. 26 S., R. 31 E., south of the lake. Pecore, R. 709.)

I know Mr. Red Campbell, and when he first went there he had a house there.

(NOTE.—Mr. Campbell's house is about an inch and a half on the map, Plaintiff's Exhibit No. 3, almost due west of the Scott Haley place that we have just identified. Pecore, R. 710.)

I know Mr. Jason Bennett.

Mr. PECORE: I can not give you the location of the Bennett place unless we can find out who is the present owner.

The WITNESS: No, sir; I could not tell you. (R. 710.)

According to my recollection, Mr. Bennett's house is located a little north of east of Mr. Campbell's place; that is right in the vicinity of Swan Lake. (R. 710.)

I know Mr. Z. L. Thomas. We used to call him Pinto Tom. He was the fellow who had the white spot on top of his head.

I don't remember so well about his place, but he had one in there some place in the general vicinity of Haley's and Campbell's.

I know George Thompson, and his house or place was close to the mouth of the Silvies River, about a mile, or possibly over, from the Neal meander line, and below it; it would be some distance from these other places that I have just mentioned.

I know Charlie Riley, but I do not remember where his place was located; it was my understanding he had a house but I could not (R. 711) swear positively.

I do not know Ed. Taylor, but I remember him.

Mr. BLACKMAR. Q. Now, these places that we have referred to, those houses were built in there on islands—high ground weren't they?

A. Yes, sir; that is my understanding.

Q. And those people continued to occupy those houses for many years, and cut the grass for many years around there?

A. Yes.

Mr. BLACKMAR. Mr. Pecore, I understand that all these places that he (the witness) has located are within the Neal meander line (R. 712), is that correct?

Mr. PECORE. Yes, sir; everyone that I can identify from his description. (R. 712.)

Cross-examination:

Mr. LILJEQVIST. Q. These islands you are talking about in the western part of the lake, those were nothing but little slight raises out there with water around them and with no greasewood or sagebrush on them; is that correct?

A. Those sand reefs in there were some places I would imagine ten feet high with greasewood.

Q. All right. Let us have you locate some of them if you can find them.

A. Well, there was a sand reef out east of Pelican Island that does not extend clear through the east side of the lake like Pelican Island does, but there is a sand reef that runs down for quite a ways.

Q. You say east of Pelican Island?

A. Yes.

It has not disappeared; it is still there.

Mr. LILJEQVIST. Q. All right. Where is there any other sand reef that you know of?

A. Well, on the north side of the lake there is (R. 717) another sand reef there that has some greasewood on it.

That place is known as the Currey place and the Scott Haley place. Scott Haley is not the present owner. I think (R. 718) he transferred the property to the Otleys. It is outside of the meander line.

Some of these sand reefs extend inside of the meander line and some of them lay outside. The one I am referring to near the Scott Haley place, now owned by the Otleys, is outside of the meander line, and that has only a short piece of greasewood along the edge of the lake there; there is no lake on both sides of it; it is entirely outside of the meander line.

Mr. LILJEQVIST. Q. Well, I am referring to the sand reefs inside the meander line.

A. Inside of the meander line?

Q. Yes.

A. Well, there is a sand reef on Pelican Island that (R. 718) is inside.

The one east of Pelican Island is outside of the meander line. There are no more that I can recollect.

Mr. LILJEQVIST. Q. Those you are referring to are islands in your estimation?

A. Well, I presume they would be islands. I have seen them when they were surrounded by water. (R. 719.)

Mr. CAMPBELL C. KILBURN, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

There may have been some salt grass on those islands; I would not say there was nor would I say that there was not any there, but in my opinion there was salt grass on the highest parts. (R. 743.)

There was salt grass growing on those islands. It would be muddy grass; and on the larger islands, if I remember right, up

above the water there would be some salt grass on the highest part. (R. 745.)

Mr. CLARENCE THOMAS CAREY, called as a witness for the plaintiff, testified in substance as follows:

The cattle would take the mud and water during the warm season and early in the fall and go out into those islands (in Malheur Lake). (R. 763.)

Mr. BLACKMAR. Q. In a good many of those years they cut hay out in the lake proper, didn't they?

A. Well, in the islands that run out. (R. 764.)

Mr. JOSEPH WARREN BUCHANAN, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

There was salt grass on the higher part of those islands, south of the Hayes and George places. (R. 927.)

Mr. WILLIAM HANLEY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Now, when you went out upon the western part of Malheur Lake to swamp cattle, what you talked about as islands were simply little elevations, with some salt grass on top of them?

A. Oh, there was lots of that big coarse grass down there.

It was big coarse swamp grass, tules, and everything. (R. 1393.)

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Do you know anything about some other greasewood island which would be up here east of Cole Island and up there south of the Otley homestead?

A. There is an island in there called Cane Island. There are several little islands in there. I do not know what the names of them are. There is Cole Island and Pelican Island and Cane Island. I remember those islands very well.

I remember some smaller islands up there, possibly unnamed islands; they had greasewood on them, and salt grass. (R. 1649.)

There are high places all through there in that section of Malheur Lake down toward the Narrows. Where it is high enough there is salt grass (on them); and there are different kinds of grasses there, and tules; years ago there used to be lots of tules; not so any more. (R. 1650.)

Mr. EDMUND J. MARTIN, called as a witness for the plaintiff, testified in substance as follows:

The time I went hunting in the spring of 1888, it must have been as early as March (R. 1914, 1921), in a boat, in the vicinity of Pelican Island (R. 1914–1916) the chances are I passed Cole Island that day, but I did not know the name of it. We visited all of those islands every place around there. We cruised all over the (Malheur)

lake for days and days. I remember where Pelican Island was, and then there was a Cole Island (R. 1916) which they called Guano Island; and then there was another island by the name of Cane Island. The other islands I do not know the names of. We cruised around them for days and weeks. (R. 1917.)

Mr. RUBIN T. HUGHET, called as a witness for the plaintiff, testified in substance as follows:

I first rode in there in the western part of Malheur Lake (now part of the Lake Malheur Bird Reserve) during the winter of 1889 and 1890; I was riding after cattle; and a good many years afterward (I rode in there).

In those early days when I was in there (R. 2192) there was high places or ridges upon which there was salt grass. I remember some islands situated on the north side of the channel leading from the Narrows to the open waters of Malheur Lake upon which greasewood was growing, but I can not give any definite location of them.

Mr. BLACKMAR. Q. There was one witness who mentioned an island here the other day, called Guano Island. Is that island known to you?

A. No, sir. (R. 2193.)

dd. 1890–1900

Mr. LEROY BUNYARD, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

There was salt grass on the islands, and where the soil was heavy enough there was sugar grass. (R. 1161.)

There were no tules on top of the islands, but there were tules growing on the edge of them lower down toward the water line. (R. 1162.)

Mr. FRANK CATTERSON, called as a witness for the plaintiff, testified in substance as follows:

I am not familiar with the different grasses that grew down there on Malheur Lake.

Mr. BLACKMAR. Q. In order to develop a hay crop on some of these islands, is it necessary that they be entirely covered with water, or do you get some hay from sort of a subirrigation?

A. Well, you get some hay from subirrigation if the water is pretty high.

Most of those islands down there (in Malheur Lake) have salt grass on them, on the higher ridges, and when you get closer to the edges of them you get sugar grass and wire grass. (R. 1187.)

Mr. CHARLES SUMNER JOHNSON, called as a witness for the plaintiff, testified in substance as follows:

On my place on the north side of Malheur Lake, east of Scott Haley's place and east and north but adjoining Simon Lewis' place, was mostly tules. We cut a little mixed grass and tules together on the highest part of the place; we put it up for hay. (R. 1252.)

There was mostly sugar grass on the Red Campbell Island. We did not cut any salt grass; there was salt grass on the higher part of the island. (R. 1254.)

Mr. A. A. REINEMANN, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Are you familiar with those islands to the north of you, or grassy knolls where hay has been cut within the meander line?

A. Yes; I have been through there several times, quite a few times in fact.

The character of grass usually found on top of those is salt grass. (R. 1669.)

Mr. JAMES A. TURNER, called as a witness for the plaintiff, testified in substance as follows:

I believe there was some greasewood down there on the Sand Reef, that was on my place (situated about a quarter of a mile south of the Ben Ausmus house), but I would not say positively, but I believe there was. I could not say for sure how wide the Sand Reef was. (R. 1721.)

Cross-examination:

The salt grass that I was talking about was (R. 1726) salt grass inside the Neal (meander) line, and there was salt grass on the north side of where he ran his line across there; that line was about a half a mile north of where my place was. (R. 1727.)

I do not know how much of that land that I had had salt grass on it; I will say there were probably twenty-five or thirty acres of it. (R. 1730.)

Mr. ALVIN C. SPURLOCK, called as a witness for the plaintiff, testified in substance as follows:

I know where Mr. Ausmus is working at the present time, and where he has his property.

Mr. BLACKMAR. Q. In there near his property, do you remember any islands covered with greasewood, or islands with some greasewood on them?

A. No; I don't remember of greasewood on them. Take it south of his place there, there is some little salt grass ridge that runs along there that looks like it might have been the bank of a lake sometime. (R. 1758.)

It (the salt grass ridge) is about a mile and three-quarters or two miles, I should judge, south of the Ausmus place. (R. 1758–1759.)

Mr. THOMAS T. DUNN, called as a witness for the plaintiff, testified in substance as follows:

The vegetation that grows on Dunn and Cole Islands consists of salt grass, wire grass, and tules. (R. 1821.)

Cross-examination:

When I first knew Dunn Island, the vegetation thereon consisted of salt grass, wire grass, and tules. (R. 1831.)

Right on top of the island there would be salt grass; below that along the island there would be wire grass, and then below that the tules would grow.

I do not know how big the salt grass area was on Dunn Island when I first knew it, but it was not very much; and it just grew on the higher points; it came right up to it (the water) a little, but the wire grass grew where the water was generally.

Salt grass grew just above the water, and kind of along on the edge of the water. (R. 1832.)

Right on top of Dunn Island was salt grass, and below that wire grass, and below that was tules. (R. 1837.)

Mr. JEFF CAWLFIELD, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Do you remember some islands northwest from the north end of Cole Island, some small islands up in there?

A. Yes; there are islands in there.

Q. Did some of those islands have greasewood on them?

A. Yes, sir. (R. 1892.)

Some of them had salt grass on them. (R. 1893.)

Cross-examination:

Mr. LILJEQVIST. Q. Now, what islands were you talking about when counsel asked you about some islands northwest of Cole Island?

A. There are just little knolls; I don't suppose they are much islands, but there is knolls all over the lake; on the north side there is knolls.

Q. Way up to the north, do you mean?

A. Yes.

Q. You didn't see anything up there that looked like Pelican Island or Cole Island, did you?

A. I have seen Pelican Island; yes.

Q. I mean up there in the north. None of those so-called islands up there were like Pelican Island?

A. Yes; I think there is. Some knolls.

Q. Where is one?

SPECIAL MASTER. Mr. Liljeqvist wants to know if there is any island up there comparable in size to Pelican Island.

A. No; there is not. (R. 1894.)

ee. 1900-1910

Mr. ARCHIE MCGOWAN, called as a witness for the plaintiff, testified in substance as follows:

In 1900 and 1901 when I first started going down there (in the west half of Malheur Lake) hunting, and going around in a boat in what we called channels of water among the tules, that looked like

they would lead you some place, into big bodies of open water, but which quite often would lead you nowhere; you would find little islands of salt grass and ridges where you could land a boat and get out. These islands had salt grass on them. (R. 1557.)

Cross-examination:

Mr. LILJEQVIST. Q. Isn't it a fact that for many, many years the people couldn't get in there (Malheur Lake) to cut hay on these so-called islands at all, unless it was very, very late in the fall?

A. It has been years since we have had years of that kind. (R. 1569.)

The vegetation on top or the upper part of the islands was mostly salt grass.

Mr. LILJEQVIST. Q. And did they cut hay around those islands?

A. Yes; I have seen hay cut there.

Q. What caused the hay to grow? Was it subirrigation, or when the waters of the lake rose up and flooded it?

A. I guess the best hay cut there was when the lake rose up, and then the water receded. (R. 1570.)

Dr. LLEWELLYN EUGENE HIBBARD, called as a witness for the plaintiff, testified in substance as follows:

I do not remember seeing salt grass in that portion of it (the Red Campbell and Vickers places in the west half of Malheur Lake). The place I was particularly impressed with the salt grass was the island or reef that runs south from the Graves place; and it was the last reef or island that I particularly noticed salt grass on. (R. 1610.)

Mr. CLARENCE W. DRINKWATER, called as a witness for the plaintiff, testified in substance as follows:

The salt grass that has been spoken of here is seen a good deal around on the high ridges; there was some salt grass on my father's place. There is salt grass over a good part of this county on the high ridges; salt grass is more or less over the entire part of the county that I have been where there was water—not too much water. Wherever there is salt grass it is an indication of alkali soil. (R. 1879.)

Mr. JESSE FARRIER, called as a witness for the plaintiff, testified in substance as follows:

I have been around the Ausmus place, and I observed an island that was there immediately south of the Ausmus place. It was kind of an island when the water comes in in the spring. The water comes in and raises around the land and makes it kind of an island.

The vegetation on that island consists of greasewood and some salt grass principally.

I have seen that island in various different winters when I have been there. (R. 1927.)

Cross-examination:

I am sure I saw greasewood on that island; below the greasewood then came the water line and kind of tules.

Mr. LILJEQVIST. Q. Was there any vegetation between the greasewood and the tules?

A. It just ran right there to the water's edge, you know.

Q. What?

A. I saw the greasewood ran right up to the water's edge, and then there commenced to come kind of tules and this here wire grass—what we call wire grass. (R. 1930.)

Mr. JOHN G. DARSEY, called as a witness for the plaintiff, testified in substance as follows:

Pelican Island and Cane Island were about the only islands I knew by name. Cane Island is west of Pelican Island. It would be kind of hard now for me to give you the distance Cane Island is west of Pelican Island; it has been a long time since I was there, and I would hate to make a mistake. We used to run across there in a boat and it used to make a day's hunt; we could go out from Nine Mile Slough and across there and hunt. One night we had bad luck, and got in late; we got lost out there and we had trouble finding the island. (R. 1959.)

I do not think there was any greasewood scarcely on Cane Island; there was this cane, and that was how it got its name, I suppose.

I do not think that I have seen other islands in that part of the lake other than Pelican Island that had greasewood on them. (R. 1960.)

Cross-examination:

Cane Island was quite an island. There was more vegetation on it than there was on the other islands. Once in a while you would find stock out on that island. The vegetation on it consisted of salt grass and mostly cane. I do not know whether anyone settled or farmed on that island later on. (R. 1963.)

Mr. JOE ORMAND AUSMUS, called as a witness for the plaintiff, testified in substance as follows:

When I first came into the country down there in the vicinity of my house (the J. Ormand Ausmus (also Ben) place) there was greasewood far below the house; about a mile and half south of it. I do not believe there was any sagebrush in there. The greasewood was growing on some of the high places; some of the knolls (on Cane Island). (R. 2134–2135.)

Mr. BLACKMAR. Let me have the location of that Ausmus house on the map, Mr. Pecore.

Mr. PECORE. You are referring to your house down off the patented lands; the one you have been talking about down in the lake bed?

A. Yes. (R. 2128.)

Mr. PECORE. That is designated on this map (Plaintiff's Exhibit 3) as B. C. Ausmus, and it is about a quarter of a mile south of the Neal Meander Line along the south boundary of section 28, township 25 south, range 32½ east; and we ought to call attention, I think, that over in lot 1, of section 20, of township 25 south, range 32½ east, is another house designated on this map as "J. O. Ausmus," where I think Mr. Ausmus was living when we were in the field, and it should not be confused with the house that he is talking about a mile from there. (R. 2129.)

The WITNESS. The island known as Cane Island has always had greasewood on it since I have known it. (R. 2133.)

Cross-examination:

The house where I saw the greasewood below it, is the house (R. 212[illegible]) on the (Malheur) lake. I think that house is slightly over a quarter of a mile below the Neal meander line.

In 1904 when I went in there there was greasewood on that place about a mile and a half below that house. I do not think there was any sagebrush on that place. The greasewood was on those knolls, on what they called Cane Island. (R. 2134.) That is the place that I am referring to where the greasewood is. (R. 2135.)

Mr. HENRY OTLEY, called as a witness for the plaintiff, testified in substance as follows:

From time to time I have been down in the west portion of the (Lake Malheur) Bird Reserve, or that portion which lies west of a line drawn (north and south) through the Sodhouse Spring.

Mr. BLACKMAR. Q. Were there some islands down in there? Some high ridges that had salt grass on them?

A. In places, yes.

It has been my experience with salt grass that it grows in alkali soil. (R. 2214.)

(No cross-examination.)

Mr. WILLIAM L. FINLEY, called as a witness for the plaintiff, testified in substance as follows:

There are these floating tule islands (in Malheur Lake); we call them floating tule islands; tule growth; the roots form a sort of surface and they grow up and die down each season; and that forms a sort of mat surface on these tule islands, where the birds nest in great numbers. (R. 2300.)

Those floating tule islands have a fixed location. They are rooted in, but as I say, when you walk over them, the matted surface kind of goes up and down where fixed. The way (they are) formed (is this): A little tule growth blows loose and goes over and begins to root and gradually spreads out.

The tule that I referred to grows in shallow water. The tule or rush, has another name, but I don't recall it, but it (is) quite a long stick-like thing that goes up and then it is pithy in the middle;

regular sort of swamp growth. I do not mean cat-tail, that is different. A cat-tail is flat. It is a plant (the tule) that is common all through in these marshy areas; only grows in shallow waters. Tule is the common name; I don't recall the other name. (R. 2301.)

From 1908 to 1917 the same conditions with reference to tules existed. (R. 2304.)

(No cross-examination.)

ff. 1910–1920

Mr. STANLEY G. JEWETT, called as a witness for the plaintiff, testified in substance as follows:

There is one island that I was on, northwest of Cole Island, which I was told they called Cane Island. I remember it very vividly with greasewood and salt grass on it. At the time of my visit, there was a large colony of two species of gulls nesting there. (R. 1997.)

In the western part of the (Malheur) lake, from the Narrows eastward for a number of miles, is characteristic tule swamp, with tule patches and little patches of open water all through that area that I have seen; there are some islands in there which are covered with various grasses. I have not been on the islands at a stage of the water that I could call them islands. Among those islands that I have been on there is very little other grasses. Northward in the fall, you can see the ground is rather rolling, hummocky, which at certain stages of the water would form islands. (R. 1998.)

Cross-examination.

I should judge greasewood covered approximately one acre. (R. 2006.)

gg. 1920–1931

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

There are several of these small islands probably averaging half a mile south of the Neal meander line, along the northwestern portion of the lake in front of T. 26 S., R. 31 and 32 E. now having a growth of greasewood on them but they are small in size; probably not any of them over 25 or 30 acres. (R. 94.)

In the higher portion (of) what we have been referring to as the islands, in that area the greasewood has a substantial growth; it is old stuff; and there is a certain amount of grass therein. (R. 113.)

Mr. THOMAS J. VICKERS, called as a witness for the plaintiff, testified in substance as follows:

When I started with the scow from the oil well in Lot 8, Section 5, T. 26 S., R. 32 E., north of the lake with a mowing machine which we loaded in the tules, we went to the islands across the first channel, first to one and then to another, to cut hay. (R. 247–248.)

1917 was the first year that we cut hay in there at that particular place, when we used the scow with a team hooked on to it to haul the mower. We have cut hay in there every year since when there was water. Some years we had dry year. (R. 249.)

5. Water Conditions

a. In the Early Days

Mr. FRANK WHITING, called as a witness for the plaintiff, testified in substance as follows:

I have been in Malheur Lake on horseback when it was not frozen, and was in the mud prior to the time when I described being in there on horseback when it was dry (1889). The depth of the water varies. In the high-water season it would run out. The country is very flat and would run out from two inches, and you go back a mile and it would get a few (R. 193) feet. I never did go out in the (Malheur) lake because I had no occasion and there was not any tules there or anything. The water was not fit for a horse to drink, and we did not go there to ride our horses; we would only ride along the shore of the lake. (R. 194.)

Very frequently I have driven stock and traveled over that road that runs from Saddle Butte to Windy Point and thence to Winnemucca. That road is out on high, dry land. In fact it followed the edges of the sagebrush and the greasewood. I have never seen the water of the lake up to that main road, and the high lands were never overflowed to my knowledge. I have never seen the water closer than the bank there about a mile from Windy Point. The water would rise up and down on the bank, which was about three or four feet straight up and down. It would never get out of that (bank). (R. 195.)

There was a road from the mouth (R. 195) of what we called Malheur Slough that skirted Malheur Lake pretty close along there, and in the fall of the year, you could travel that road; but in the spring of the year when the waters were high you had to go next to the brush. The water at that particular point evidently came from Malheur Lake but I would not say as to that exactly.

At Windy Point, Malheur Lake had a fixed location there almost; it did not vary more than a few hundred feet in those early days.

On the north side of Malheur Lake near Lawen it would vary from five to six miles, from month to month and year to year. In other words, it did not have any definite fixed point where the lake came to every year. Sometimes if we had high water it would come way out; and other years it would go half way out to the edge of the brush or salt grass. (R. 196.) There is no bank that I know of along the north side of Malheur Lake in the Lawen district at all, it is just a high gradual slope out.

Where I refer to there, that would be at Windy Point or west of Saddle Butte.

There was a low strip of country that makes a circle between Saddle Butte and Lawen, and in the high-water season that was a lake. When I first saw it there was water on it, and then there was just a dry alkali bed, the same as these other lakes when they dried out, and there was no vegetation on it. (R. 197.)

Cross-examination:

There were two roads that skirted Malheur Lake from Saddle Butte to Windy Point, one out on high ground, another closer down. You had to travel in a circle there and curve around the lake. If we could cut off a mile or two on horseback we went close to the lake; in the fall of the year, you could cross the mouth of the Malheur Slough with a wagon, and they traveled right along close to the edge of the lake from there to Windy Point. In the spring of the year that road would be impossible for a wagon to travel on because it would be soft. That road was outside on what I would term the lake bed. It was northeasterly of the bank I have referred to (at Windy Point).

They did not use that road in the early days in the normal spring season of high water because of it being soft. (R. 199.)

When I was down at the Sodhouse in the early days I do not think I saw the water back up into that spring. You could see the lake there plain from the Sodhouse Spring. The water was about a mile from the spring. (R. 199–200.)

The water of Malheur Lake backed up right to the town of Lawen and I think that was an ordinary thing in the spring of those early days. (R. 200–201.)

The water on the Malheur Lake side of the Sand Reef was full of tules and marshy. (R. 202.)

The water came down from the Silvies River and ran over the lands (on the north side of Malheur Lake). After the water got into the lake I suppose some of it backed up, but some of this land was outside of the meander line; it did not do so to the same extent on the south side of Malheur Lake as it does on the north; or any more than at the mouth of the Blitzen when there is a flat country there. (R. 205.)

The water of Malheur Lake was clear out to Pelican Island from Windy Point.

Mr. LILJEQVIST. Q. Then from Pelican Island to what they call Cole Island was another vast body of water?

A. I don't know that.

Q. Wasn't there westerly of Pelican Island a vast body of open water, practically free from tules, as far as you can remember it?

A. Yes.

The greatest body of open water was along the east of where the (R. 206) Silvies River runs into the lake, to Windy Point with the

exception on the north there was a considerable area of tules along the edge or borders of the lake. The dense tule formation along the margin would make it difficult to get into the lake, you had to follow a cow trail or you didn't get there; a channel was no better. (R. 207.)

In some places there would be a bunch of tules covering several acres and having a vacant place of open water (R. 209), and then another bunch of tules. I never hunted in there in any boat; all I hunted was cows in there, and I never swamped them out on the ice. (R. 209.)

Redirect examination:

The greatest trouble we had on the lower road was for a mile or so out from Malheur Slough east towards Windy Point. (R. 209–210.) Part of that water may, or may not have come down Malheur Slough which wet that area up. Malheur Slough had quite a deep channel there. I have never seen the water over the banks of Malheur Slough. (R. 210.)

Mr. THOMAS GEORGE HOWSER, called as a witness for the plaintiff, testified in substance as follows:

I never rode out into Malheur Lake getting cattle, but I observed the tules from the shore and they appeared to go out quite a distance. I think in places there was six miles that was open water and it varied considerably as it went around the lake; some places probably a couple of miles.

I am familiar with the road that is near Windy Point. (R. 215.) I have never seen the water up to Windy Point, but very close to it. I have never observed the wind blowing the water up to that point. (R. 216.)

During the dry years, Malheur Lake did not come nearly as far as it did in the wet years.

Malheur Lake was virtually dry before 1890. (R. 216.)

What I mean is, that while riding, I have seen Malheur Lake at the point where you could not see very much open water. It was very scarce at times. There was a considerable distance between the high point in dry years and the high point in wet years. (R. 217.)

On account of the lack of water, the hay crop in that country has considerably decreased since I first came into this country. (R. 221.) I do not think that the constant feeding of cattle down there with the tramping in and eating it has anything to do with the hay crop because the time of the year that they tramped upon the ground, there would be no injury to (R. 222) the grass; they were taken out before that time. They were in there in the wintertime, and very little of the time that it was soft. (R. 221–222.) I have driven cattle along the road on the east side of Malheur Lake that leads to Winnemucca. There are two or three different roads that run around the edge of Malheur Lake there, and do not know that I have ever seen it, or that I have been there at a time when the water was

up to that (higher) road. The lower road was there close to Malheur Lake and at times it was covered; but the road on the higher land all the way never got water over it. The lower road was a short cut when the water was low enough; in the spring when the water was high (R. 222) it was closer to Windy Point on higher ground, but the higher road I have never seen under water. (R. 222–223.) I have never seen the lower road under water, but I saw evidences of it. (R. 223.)

Cross-examination:

The water in ordinary high-water periods was probably a quarter of a mile from the old town of Lawen.

The water has been decreasing for a good many years on account of the shortage of snowfall and rainfall. (R. 227–228.)

Malheur Lake was dry this summer, and it has been dry for the last two years almost entirely. Prior to that there was considerable water in the lakes, but there have been some dry years though before that even. (R. 228.)

When we went out in a boat hunting, we would strike the mud with the oars in lots of places, and in some places we rowed. In ordinary normal high water if I could have got into the Silvies channel I could have rowed right down to the lake in the early days. (R. 229.) When I would get out to the tules, I would find a lot of open places. After I would go for a mile out into the lake, and would start to come back, I would find hundreds of places that looked like other places; it was difficult to find the same place coming back again.

At ordinary high water around the edge of Malheur Lake, the water went down to where it was very shallow, and as the lake receded, it would be shallow. It did not seem to change much. If it was up close to the bank it was shallow; if it receded some it would be shallow when you first struck the water. There was a period of three weeks or a month between the high-water period in the Silvies River and the high water of the lake. (R. 230.)

In the early days, there were a great many summers when there was so much water they could not cut the hay until they got way out into the deeded lands; the water stages got so, many times, that it prevented the ranchers from putting up their hay.

I worked in July or August once with Mr. Vickers in a hayfield on what was known as the Brenton place, on patented lands. The water did not interfere with the hay crop where we were. (R. 231.)

Redirect examination:

I have never seen hay cut where there was any water at all on it, you have got to have practically dry ground before you can cut your hay. (R. 233.)

Recross-examination:

The people in this country never did mow with hay scythes in the water in the early days. (R. 233–234.)

Mr. THOMAS J. VICKERS, called as a witness for the plaintiff, testified in substance as follows:

The size of Malheur Lake changed from year to year. (R. 252.) Back in the eighties it was very much smaller. In the month of June you would have a great big water surface, and it sure decreases by the time September rolls around or in the latter part of the year. It has been my experience in all the fifty years I have been around here that Malheur Lake changes from year to year. There has been a change all the time. It wasn't that way, but when we had a dry year, it took quite a while to get back; but now you can not figure very much, because there is no lake there. (R. 253.)

Cross-examination:

The water was high enough to flood a little of the deeded lands around the meander line, but I do not believe down in that country it flooded much deeded lands, that is, down where I am; some on that side of the lake, but I don't know much about that side, toward the Blitzen. (R. 258.)

Since the Sand Reef broke through (1881) there would be some back water that would get in near the town of Lawen; kind of a rush of water that would back up and it would be probably a mile, but I don't understand how the water gets in there. Something backs it up. There is no channel that goes down there. (R. 260.)

In the spring of 1917 when it broke up I was around there at Saddle Butte, and the water was all around everywhere; that was a rush of water, but I do not think it stayed there very long. (R. 260.)

For about fifteen or twenty years before the train came (R. 261) into Crane I used to freight wool along the road by Windy Point. When we went to go after the loads, we went around that way to Steen's Mountain. I saw the water there in the lake. There are two or three little roads there. We had big outfits. Toward Windy Point there is a little shore there, so that we never went down into the muddy places, but I know there was water over there, and I think it ran out the Seventeen Mile Slough, but I do not know whether it backed up from the lake or where it came from. (R. 261.) The Nine Mile Slough and the Seventeen Mile Slough run together. (R. 262.)

Redirect examination:

We used eight, ten, or twelve animal teams and three wagons, with three and three-quarter and four inch wheels in freighting the wool over that road around by Windy Point. We were bound for Ontario and Huntington on the Snake River, east of here. We would come out of the mountains and then go over to Huntington. In doing the freighting by Windy Point we never got stuck in the mud. (R. 263–264.)

Mr. JOHN GARDNER, called as a witness for the plaintiff, testified in substance as follows:

In trapping on Malheur Lake, we would go in boats in the winter-time; sometimes the water was six inches, sometimes three or four feet; you could tell by putting your oar down in the water and mud. We had gum boots and pulled our boats over some of the places. (R. 267.) In sticking the oar down into the mud and water, you can not tell how much mud there is and how much water. You might have a foot and a half of mud and water. Generally I made an oar eight feet long, and would stick it down about half-way and there would be water and mud on the oar. Lots of times we got out and pulled the boat in about an inch, and in some places four inches of water. (R. 268.)

The open water in Malheur Lake would be out there up where Del Hayes was farming and from there across and down the other way toward and by Cole Island. That is where you would find the open water except these channels. (R. 269.)

I have been down in these lakes in the spring of the year, during high water. I have trapped Malheur Lake in March all the way up the channel. I have been there in March, April, and May, and I generally quit in June. I have helped with haying on Campbell's place. The water surface of Malheur Lake comes and goes according to the snow and the downfall we got. Some years it is high, and some years it has been low, but this year is the lowest I ever did see it. (R. 272.) It is according to the amount of snow we get, and the water that runs into it. Some years, it is up to Saddle Butte; some years it is back farther; it depends upon the downfall from the mountains.

I have been around Windy Point lots of times. I have seen the water perhaps less than quarter of a mile or thereabouts from the high road at Windy Point. I have never seen the water over that high road. In low years, the water would be several miles out from there; it would be way out, a mile and a half or two miles. (R. 273.)

I have never tried building a pier out into Malheur Lake; it would not have worked very well, I am afraid you would have dry ground to go on. (R. 280.)

Cross-examination:

We watered our horses in Malheur Lake (in 1878) a quarter of a mile or thereabouts from Saddle Butte. (R. 283.)

I do not know whether the water got back there many a year thereafter. I was not there for quite a while after that (1878), I went south. When I came back, I saw the lake there; I saw it go back a mile and a half or two miles. When the normal high water came in the spring, it would go there or thereabouts. The water was so deep in Malheur Slough that I had to swim my horse, and that was backwater of Malheur Lake. The lower road that goes

by Windy Point would have some water right close to it. Under normal seasons, the water got fairly close to (R. 284) Windy Point, closer than a mile to it. The water did not come up to the east bank, that is along Windy Point, or beyond that east bank. Sometimes it went back. After I came back, I have seen the water on both sides of the Neal meander line southeast of Windy Point—that big depression that comes in southeasterly of Windy Point. Sometimes it was one way, and some years it was the other. I calculated from that, though, if we had a wind at the lake, why it would blow it out, and when the wind quit blowing, it would go back. That is the way I figured on that. If the water got way beyond the Neal meander line, or southerly of Windy Point, that would be an unusual condition. The normal condition I have described. (R. 285.)

I first saw the Sodhouse Spring (Springer's Spring) in 1883. John Marshall took a place up in there, and Bill Marshall, his brother, was above him. Right back of Springer's, there was a little lake, and there was a little (R. 285) channel there that ran into Malheur Lake from that spring, and the water of the Blitzen would follow that channel down by Bill and John Marshall's places. In the early days the water of the lake would back up close to Springer's Spring (Sodhouse Spring), but maybe not quite; sometimes it would be up there. The last time I saw the Sodhouse Spring was about ten years ago. I do not think that the water would rise up higher in the early days in that spring than it did ten years ago. I think it is the reverse. I am familiar with the old Sodhouse, and I know the man who made it. (R. 286.) In the high-water seasons the water would come maybe quarter of a mile or something of that kind, pretty close to that Sodhouse. Before the grade was put in there, I have seen the backwater right up into the Sodhouse Field. The Sodhouse Field is south. I have seen it across Mr. Dunn's place, too. (R. 286.) The Sodhouse Lane is the old Meldrum line near Mr. Springer's place and I have seen the water way up there and way back, both ways. (R. 286–287.)

Mr. LILJEQVIST. Q. In the normal season of high water according to your best judgment, would it be northerly of that Sodhouse Lane?

A. Oh, let me see. Up there about the Hughet place and them other places, oh, probably half a mile.

Q. Half a mile, then, would be a fair judgment of the distance?

A. Yes.

Q. At ordinary seasons of high water, when the water backed up from the lake?

A. Yes. (R. 287.)

One time there was water belly deep of a cayuse in the channel that goes by Scott Haley's present place (located just half an inch on the map, Plaintiff's Exhibit No. 3, practically east of the Neal meander corner of sections 17 and 18, T. 26 S., R. 32 E.). (R. 293.) That place was first owned by Ed Grout, and then another man traded it and got it from Grout, and a man by the name of Jim

Bunyard owns it now. It is on the south side of Malheur Lake and away east of the Narrows.

A couple of years ago the water went down in the dry portions of the year and a number of us got several hundred tons of hay.

Mr. LILJEQVIST. Q. In other years you could not cut any hay at all?

A. Yes.

Q. And in normal years, you had so much water that you could not cut it at all?

A. I have never seen any years when you could not cut it.

I have seen the water when it was up over the Narrows road that is used for travel toward Burns, immediately after you cross the bridge going north. I have also seen it when there would not be any water within half a mile of it. (R. 293.) One or two years since 1920 the water has been on both sides of that road. (R. 294.)

Redirect examination:

On my place there on Malheur Lake, Mr. Campbell helped me put up about sixty tons of hay one year, and I helped Mr. Campbell put up about a hundred tons in different seasons—not one season, but different seasons; and Mr. Haley, the same. (R. 299.)

Recross-examination:

And in order to get that hay, we would have to have water, and the people who lived on the deeded lands around Malheur Lake had to have water, and the lake had to back up around them except where the Blitzen and Silvies (Rivers) overflowed. (R. 299.)

Redirect examination:

The water also had to recede before you could cut the hay. (R. 299–300.)

Mr. WILL Y. KING, called as a witness for the plaintiff, testified in substance as follows:

In July, 1879, when I was 20 years old I went with a team and wagon with my parents to settle in Happy Valley in Steen's Mountain, and on the way we went right by the east end of Malheur Lake. We crossed Malheur Slough and followed a dry well defined travelled road along in there. (R. 300–301.) The road did not show any evidence of ever having had water on it, except right out here on the east side of the river. There was evidence of where it had been overflowing at times but not around the lake.

The road we travelled went right near to Windy Point and right opposite to it. It was a half mile out to the water in Malheur Lake. We went out to the lake to water the stock. (R. 301.) There was a strip of open water there along the east end of Malheur Lake, probably a half mile wide at that time. (R. 302.)

In later years subsequent to 1879 I was over on the north side of Malheur Lake and you could see open water and a good many tules. (R. 304–305.)

The Silvies (River) overflows quite an extent on the country down there toward Malheur Lake. It has two or maybe more channels that run into Malheur Lake.

The Blitzen River is a good deal the same, or it was in the early days.

From year to year Malheur Lake changes in the size of its area, and from one year to the next, even in the wet season, you cannot tell just how big it is going to be. (R. 307–308.) It is an inconsistent sort of a thing. (R. 308.)

Cross-examination:

Mr. LILJEQVIST. Let me put it this way:

Q. Do you know where the deeded properties are around that lake?

A. Yes.

Q. What is the fact about the water in seasons of normal high water going out with the rising of the lake onto the deeded lands?

A. Yes; I have seen the water from Malheur Lake over what is deeded lands.

Q. Just to refresh your memory, and maybe you misunderstood the Government when they inquired of you, but as I understand you were asked a question as follows:

"In high water in the lakes, could you give me an estimate as to where the margin would extend around the lake? Would it be within what is now the new meander line?"

And you answered: "It would be outside of the new meander line during the high water."

Is that correct, or did you misunderstand the question?

A. I must have made that answer.

Mr. COLLINS. You should show that that is a statement that he gave to me, and not his testimony before this Court.

Mr. LILJEQVIST. Surely. I just wanted to get this straight, that is all, on that.

Q. What I was trying to inquire about, Mr. King, is it not a fact in seasons of high water, the waters of the lake raised to an extent that it went beyond the Neal meander line? (R. 315.)

A. I cannot place the Neal meander line.

Q. What you call the new meander line?

A. I don't know.

Q. The new meander line is below the patented and deeded lands?

A. Yes.

Q. Now, you have been here for a great many years as county treasurer, and you are acquainted personally with a great number of persons in this community, aren't you?

A. Yes.

It is a fact in seasons of high water in Malheur Lake that the waters of that lake rise and flow onto the patented lands and that is the way they get their hay crop. (R. 316.)

During the nine years that I was acquainted with Malheur Lake, 1879 to 1888, in the spring of the year water would come up over what was a great portion of the deeded land.

Mr. LILJEQVIST. Q. At Springer's Spring were you familiar with the water at normal ordinary seasons of high water after the Sand Reef broke through as to where it was?

A. Yes.

Q. Now, how far northerly would the normal high-water mark be north of Sodhouse Lane, for instance?

A. It would back up over the ground, back up south where the road now is. There was no road then.

Q. It would back up even that far?

A. Yes. (R. 317.)

Mr. JEFF D. BILLINGSLEY, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Has it been your observation of that (Malheur) lake, going clear back to 1880, when you first came there, that the stage of the water changes considerably from season to season, and from year to year? (R. 385.)

A. Yes; I believe it does.

Q. And might it be summed up by saying it apparently has no fixed point to which it rises every year; that some years it goes up and some years it doesn't go quite so far?

A. That is about the condition I observed there. (R. 386.)

The spread of Malheur Lake between the low and the high waters that come and go each year I would estimate from plumb dry—there is a kind of an offset from Windy Point about half a mile from Windy Point in toward the lake, that looks like it might be the extreme margin of the lake, and I saw the water close up to that offset; I never saw it plumb up to that. It was away back from that offset in 1889, not several miles, but I was looking there in the early summer and it probably was back a mile from the border of the lake. (R. 389.)

Cross-examination:

The road I have referred to is westerly but close to the border of Windy Point. It is on the level ground and it slopes up a ways and then goes up straight. Probably from right up on the point down to (R. 389) the road would be a couple of hundred yards, and when I saw the water at Malheur Lake it (R. 390) was about half a mile out from that place.

1889 was a low year. Eastern Oregon went dry that year.

Mr. LILJEQVIST. Q. There has never been anything like 1889 excepting this year, and this is still worse?

A. Yes; but I never did see the water over any roads.

There are three or four roads there. I never saw the water above that little border, or offset, that looked as if the waves pushed the water out, and anybody who went along there saw it, and I passed

there at all seasons of the year for probably ten years, and I never saw it above that.

SPECIAL MASTER. Q. Do you mean a bay out of the lake? (R. 390.)

A. No. It is the end of the lake and then there is a kind of a marsh, then here comes a little raise and the extreme high water made that raise.

Mr. LILJEQVIST. Q. Will you take a look at that map? Do you see at the southeast end near Windy Point, which is to the right of that map (Plaintiff's Exhibit No. 3), there is a bay off in there and there seems to be a jog to the southeast. Is that what you refer to?

A. No, sir. I am not referring to that. (R. 391.)

Q. Where is this jog with reference to Windy Point?

A. It is right direct as you go from Windy Point to the center point of the lake.

Q. Are you talking about the two-foot bank?

A. I didn't say a two-foot bank. Anyway, it is from six inches to a foot, as I remember it.

At any rate, there was a bank of some kind there and I have seen the water come up to that bank.

Mr. LILJEQVIST. Q. Now, outside of this unusual condition of 1889, as I understand you the normal condition of the water in the springtime was within half a mile of Windy Point?

A. Well, I think this bank is about half a mile from Windy Point.

Q. And that bank is the normal stage of the water in the springtime?

A. No, sir. (R. 391.)

I do not know what is the normal stage of the water. I know it is not there, it is further in. I don't think it was ever two years the same.

Mr. LILJEQVIST. Q. Do you mean to tell me the water did not come back on this lake year after year, and year after year in the past seventy years?

A. No, sir. (R. 392.)

Q. And you are not trying to tell me that the water came back and flooded the Neal meander line of 1895, are you?

A. I don't know where the Neal meander line is.

Q. How far, then, was it from your interpretation of where it went back in normal year, not in 1889, but in the seasons that you say it fluctuated; what is the extreme fluctuation from what point to what point at Windy Point?

A. I imagine in 1889 when it was dry, it was probably a mile from this border of the lake into the water.

Q. And that was the extreme westerly recession of the water from the eastern bank?

A. That is when I saw it that way.

Q. Then at all times since that time, excepting in 1889, it was somewhere between that point and the eastern side of the lake near Windy Point? (R. 392.)

A. Well, I would not say that for a fact. When I saw it it was between those points. It probably went lower than that in 1889; I can't say about that.

Q. But I am saying though, at that point that you have described in 1889, the normal stage of the water was somewhere between that point on the eastern side of the lake or this bank or offset that you have described near Windy Point?

A. Yes, sir.

In those early days, the stock got water at the lake there near Windy Point. They would drive out a little ways and (R. 393) that is where they got their water for man and beast.

Q. The water was drinkable, was it?

A. Well, you could exist on it.

Q. It didn't taste any too good?

A. No. Later on there was a well drilled there when this was established into a county, and that water was worse than the other; it had more salt in it.

Q. You would not call the lake a salt lake? It was a brackish lake?

A. We drank it and people were not as particular in those days as they are to-day. (R. 393.)

Mr. MARTIN ANDERSON LUCAS, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

The time I went duck hunting out near Saddle Butte, we started out from the little town of Harney City. The boat that was used was at the edge of the lake, and we camped about thirty feet away from the water up on a salt grass place. The lake was within thirty feet of the salt grass. There was a sloping bank there. From that location we went in an easterly direction (R. 425) to get past Saddle Butte, then past Windy Point, then went around on the south side of the lake all the way up to the Narrows. You could not see any water at that time, which was in the early eighties, from Windy Point. I do not know how far the lake was from Windy Point. We did not stop at any spring until we got to the Narrows. (R. 426.) Two of the men who were with us at that time went out into the lake into the boat. There were five of us in the bunch. They got out into the lake a quarter of a mile, but I did not, I was not in the boat with them. There was a lot of open water out beyond there (out from near Saddle Butte toward the lake).

Mr. LILJEQVIST. Q. Did you stick your oar in the water to see how deep it was?

Mr. BLACKMAR. He said he was not in the boat.

A. They said they could not touch bottom with the oar or with the paddle.

There was a bridge there at the Narrows which we (R. 427) crossed at that time in the fall of the year (R. 427–428), then we went around toward Mud Lake and Harney Lake and hunted there, and we hunted coming back; then we came back and stayed.

Mr. LILJEQVIST. Q. When was the first time that you saw the lake?

A. Well, you might call it a lake. It was when the water was all over the valley.

That spring, the water was all over the Harney Valley. I saw Malheur Lake at a distance in other years. It looked like quite a body of water. We came over the Devine Ridge and you could see the lake for miles.

Mr. LILJEQVIST. Q. It looked like a vast body of water, didn't it?

A. Yes.

Q. From 1869–1875, during that period, did you ever have any normal winters?

A. No. (R. 428.)

Q. What do you call a normal winter in this country? You described one where you had four feet of snow across some slough, I think at Saddle Butte. Was that an unusual winter?

A. There was a little slough there where they put the boat into the water; there was a little slough between that and a little island there covered with tules..

SPECIAL MASTER. I suggest you come up closer to the witness Mr. Liljeqvist, he is not answering the questions.

In the fall when we were hunting, the water of (R. 429) Lake (Malheur) was about thirty feet from where we were camped (R. 429) down toward Saddle Butte (R. 420). There was a sloping bank clear down to the water. I have never been out on the lake at any other time.

I do not know anything about Poison Creek. (R. 429.) I believe I knew where Malheur Slough was. It was filled by water from the hills. I never heard it called the Nine Mile Slough, or Seventeen Mile Slough. (R. 430.)

The bridge that we built in February, 1868 (R. 415–416) was across the Silvies River. (R. 430.)

I have been along that road from Saddle Butte to Windy Point. (R. 430–431.) You could see the water of Malheur Lake from that road in some places, and in others you could not. The water was probably quarter or half a mile or more from that road. (R. 431.)

Mr. ROBERT IRVING, called as a witness for the plaintiff, testified in substance as follows:

I have not been out on Malheur Lake on horseback or on foot, so I have not had an opportunity to observe the depth of the water, and I do not know anything about it. (R. 437.)

There is a considerable spread between the high point and the low point of water in Malheur Lake. I can not give the estimate in yards or in miles.

Mr. BLACKMAR. Q. What would you say that would amount to in yards or in miles?

A. Well, I never noticed that, you know. A man takes an observation, and he never thinks it is coming up again, so he never thinks about it, as to just how far it is, and everything like that. He

never thinks about anything coming up, unless something special is connected with it, and he puts it out of his memory. (R. 438.)

Q. See if you can not give us your best estimate as to how much it would amount to in either yards or miles.

A. I could not do that at all, because sometimes it was way out and sometimes way back, and you can not give an estimate at all as to whether it was a wet or dry winter.

Q. From way out to way back, how much would you say that would be in miles?

A. Oh, some places there it would go back farther than others. Maybe half a mile back. You could not tell. (R. 439.) I don't think a man can tell unless he measures a thing, or gets some estimate that way, which impresses the matter upon his memory; and it would be hard to remember all these years.

Q. Well, at any rate, it would be quite a distance?

A. Sometimes, yes.

Q. Have you ever observed whether or not this Malheur Lake has any definite bank, or does it just kind of slide right down without a bank?

A. Well, it kind of slides down all right, but there are places where there are sloughs in this lake, and it is deeper there than otherwise.

I have no opinion as to how those sloughs were formed; they were there according to my earliest recollection of them. (R. 439.)

I know Windy Point. The closest I have seen the water of Malheur Lake to the old road—the high road—that runs along Windy Point, is half to three-quarters of a mile out there. Sometimes when the wind was blowing and waves were rolling high, it may have been a little closer. The wind has the effect of carrying the lake up toward Windy Point. With the wind blowing on it, it naturally creates these waves and they get up higher on these lands. When the wind would die down, the water would immediately recede, unless it got into some of the sloughs, or something there, and it might stay for a while.

Mr. BLACKMAR. As I understand your testimony, the (R. 440) stage (of water) of this lake changes from year to year, and from season to season?

A. Yes, sir.

Q. So that a person would have considerable difficulty in saying what was the normal height that it would reach in any one particular year?

A. Yes, sir.

Q. That is, it does change every year?

A. Yes, sir. (R. 440–441.)

Cross examination:

I did not know much about Malheur Lake before 1884, but from that time on, I was down there considerably on the lake. We swamped our own cattle out of the lake.

Mr. LILJEQVIST. Q. Do you know whether or not a lot of cattle were drowned in that lake breaking through the ice, as it broke up?

A. They were not drowned unless they were mired down and got into some of these sloughs.

I have seen a lot of cattle in the Red "S" Field pile up and freeze to death. (R. 441.)

There was a good deal of water in Malheur Lake until the last years here. I used to go up on the hills, and you could see all over both of those lakes (Malheur and Harney) from the top of the mountains. From those hills it looked like oceans out there; there was all water out in there; you could see over the tules from there.

Mr. LILJEQVIST. Q. And places that looked like nothing but tules, when you got up there there was vast water (R. 442) over the tules?

A. Yes; there were no tules hardly on that northeast end of the lake over by Saddle Butte; there are no tules right up to the banks; it was all water.

Q. The greater portion of the lake easterly from a line running from the Blitzen (River) on the south to the Silvies (River) on the north was open water mostly, wasn't it?

A. No; when you go up to the Silvies River there were lots of tules there. And along the edge of the lake. (R. 442.)

Down toward the Blitzen (River) there were a good many tules, but when you got up to this other end of the lake by Saddle Butte there were not many tules. (R. 443.)

I have never driven a stage down the road from Saddle Butte to Windy Point. I have traveled that road a good many times, and, according to my best recollection, I have given the best description of where the water (of Malheur Lake) came to there. (R. 444.)

Mr. LILJEQVIST. Q. Are you able to say at all how far the water rises in that lake in the ordinary spring freshets?

A. I don't know as there are any ordinary spring freshets. It is generally a big freshet or a low freshet.

Q. Hasn't there been year after year, when the water has been fairly the same?

A. Oh, no; there are wet years, and there are dry years. They don't hardly ever two come just alike.

Q. Take the average of the two then, which would probably be normal, about where would it come within the average of the two with reference to the bank at Windy Point? (R. 448.)

A. I don't know as there are any normal years here. If you take the evidence all around, I do not think you will find normal years in Harney County.

Q. The trouble is, the Government has been trying to educate you witnesses to that effect, isn't that so?

A. No, sir.

Q. Do you mean to tell me that there hasn't been year after year in this country when you can not tell when there would be a normal waterfall?

A. No, sir, you can't.

Q. It was either a flood that covered the whole country, or it was something like 1889, is that what you are trying to tell me?

A. Yes, sir. (R. 448.)

Q. Isn't it a fact that the only way that the settlers who had deeded lands around that lake could get a hay crop was by backing the water over their deeded lands beyond the meander line, and if it didn't back up to wet the lands they wouldn't get any crop?

A. Nobody would get any crop unless the water came on the land. This water when it got down there it naturally spread out.

Mr. LILJEQVIST. After it got into the lake it filled up the lake, didn't it?

A. Yes, sir.

Q. And as the lake filled up, it spread out over its banks, didn't it?

A. It backed water out into those sloughs, and the sloughs would get full, and the water would spread out over the land. (R. 449.)

Q. And get on to the deeded lands?

A. Yes.

Q. And when it did that, they got a good crop?

A. A good many times it didn't do that; the water spread out before it got to the lake, and filled up all the sloughs and (R. 449) rivers, and spread out, and they would get a hay crop.

That would be from the Blitzen and the Silvies Rivers.

Mr. LILJEQVIST. But there are vast areas around this lake that are not irrigated by the overflow of that stream, or the Blitzen and the Silvies, isn't that correct?

A. Not such vast areas that they cut the hay on.

Q. I stated there was a lot of deeded lands around that lake that are not irrigated by water flowing directly either from the Silvies or the Blitzen?

A. I don't think they would be irrigated unless they got the water from the Silvies or Blitzen (Rivers).

Q. I am distinguishing between the back water and the overflow from those rivers. Let us forget the backwater from the lake for the moment. What I am trying to do is to see what you remember about it. Isn't it true that there are a lot of lands around the lake that have crops by the raising of the water of the lake, as distinguished from overflowing from the rivers themselves, and over the banks of the rivers?

A. When that water goes down there and goes into the (R. 450) lake, and get it so full, it backs up on those people; and there are a lot of sloughs that fill up before it gets down there and overflows this land. All that water doesn't go into the lake that goes down there; it spreads out in a good many cases.

Q. When the lake backs up it also fills the sloughs (R. 450) doesn't it?

A. Yes; but a good many of those sloughs are full before that. Now, you take it up on the upper island—what they call the upper island—the lake doesn't affect that so much, but they still get a lot of hay.

Q. What do you refer to as the upper island?

A. Up toward Burns.

Q. That is out on the deeded lands?

A. Yes. The water overflowed that land and if it doesn't overflow, they don't get any hay.

Q. That land is overflowed by the flood waters of the Silvies, isn't it?

A. Yes.

Q. And a lot of it is flooded by the backwater from the lake?

A. Yes, sir; because the water goes to the lake and has to back up. That is virtually a level country and the water backs up.

Q. To what point does the water back up to? That is what I am trying to get at. Do you know?

A. No, sir. Some places up there in the Red "S" Field above the Meldrum line, some of those sloughs are not running and the water is backed in there. (R. 451.)

The Red "S" land is outside of the lake, but that was nearly all swamp land. This man Hen. Owens swamped it and sold a good deal to Todhunter and French.

Mr. LILJEQVIST. Q. And that was another complication of the situation that arose in the French-Springer case, wasn't it?

A. Yes, sir. And Mr. Devine told me that himself; he said, "The people are all blaming me"; he said, "They got my money and I bought it from Owens," and he said "They kept my money."

Q. And that was the famous Hen. Owens who was known as the swamp-land angel?

A. Yes.

Q. That was the man who was alleged to have stolen thousands of acres of land from the State of Oregon under the Swamp Act.

A. I don't know that. (R. 452.)

Mr. DARIUS HYNSON SMYTH, called as a witness for the plaintiff, testified in substance as follows:

In the spring of 1874, sometimes I went right around the lakes the same as we did when we first came to the country in 1853, and sometimes we went across the hills to Happy Valley. In that year of 1874 I was right by Malheur Lake.

At that time, Malheur Lake spread over a great deal of country, but it did not get any great depth anywhere; there was a great body of water, spread over the country; there were no banks there, or nothing to hold it. The water was spread pretty well all over the country. (R. 458.)

During the period I have been familiar with Malheur Lake (1872–1931) it has got drier all the time since I have been here, you might say. We have had some seasons that the water kept up pretty good, but in the last twelve years, I would say it has generally been getting drier all the time.

Between 1874 and 1918, the only change in the water area of Malheur Lake, to my way of thinking, would be the evaporation,

There is no outlet. In some years it would be drier than others, and it would spread out farther. I could not say what is the difference in miles between the high line and the low line on that spread of water in those years.

Mr. BLACKMAR. Q. What would you say would be the difference between the high line and the low line on that spread in those years; how many miles would it be?

A. I couldn't say as to that; I don't know.

Q. Say, this is where it came up to in (R. 461) a high year here, and here is where it was in a low year. [Indicating.] Do you see what I mean and what I want to know? Can you tell me how many miles it would be between those two points?

A. It would not be any miles at all. Just evaporation. That is all. It could be all lost. There was no run-off to it. (R. 461–462.)

Mr. BLACKMAR. Q. Now, in the fall and the winter of the years since you have been here in 1874, it has been customary to feed the cattle inside the Neal meander line, hasn't it, and winter them there?

A. I have fed the cattle there ever since 1891, every winter until the last few winters.

I ran a buckaroo outfit for thirty or forty years; sometimes in the winter when the grass was good, we did not feed much; just used to range; since 1891 I have been feeding cattle regularly and I have done most of my feeding there (inside the Neal meander line). I have a ranch up next to mine where I cut quite a lot of hay and I generally move up there in the spring. In the early days, the cattle used to come out of the swamps after wintering in fairly fat condition, sometimes they were poor. The hay that was cut there was mostly stacked inside the Neal meander line. I do not bale my hay, some people do. (R. 473.) The hay that is stacked up there in (Malheur) lake is fed down there in the lakes to the stock in the wintertime. (R. 474.) The hay that is not used, we carry over until the next year and let it stay in the stack there. Sometimes it gets pretty wet; I know personally that stacks have stayed there for several years, probably two or three years. The hay at the bottom of the stack does not seem to rot; it depends on how you put it up; the water lays on those stacks until they get half wet, and when it dries out, that hay seems to be as good as any of it. (R. 474.)

Cross-examination:

Mr. LILJEQVIST. Q. That hay was born in the water and can stand under it?

A. It does it anyway. (R. 475.)

Q. Now, I want you to tell the court whether the backwater from the lake at ordinary high-water seasons comes up there and floods your deeded lands, and enables you to get a hay crop.

A. To some extent I think it does. (R. 478.)

Q. And is it the flood waters of the lake?

A. When the lake is up.

Q. From 1891 on then, what is the fact about the waters of the lake usually in the springtime flooding your deeded lands?

A. Why, there was plenty of water there to get hay. (R. 478.)

Q. Did they (the deeded lands of your neighbors up and down the south side) get their deeded lands irrigated by the backwaters of the lake? (R. 479.)

A. I don't think so; not very much of it. I think it is from the running water of the Blitzen (River).

I do not know whether they put any dams in there, and I am not very familiar with the other persons' land. (R. 479.)

I have been around Windy Point very often; ever since I came into the country.

Mr. LILJEQVIST. Q. From 1872 on, where, in your judgment did the water come in ordinary springtime in that lake with reference to Windy Point?

A. I couldn't tell anything about that.

Q. About how close or how far would it be away? What is your best judgment?

A. I couldn't give an idea at all.

I have been along Windy Point and watered my cattle and horses there in the (Malheur) lake. I never drank the water myself. I watered my horses there. We had a well out there to water our stock. It was quite near Windy Point. (R. 485.) As I looked west from there, I saw an open body of water, but I can not tell how far it seemed to extend toward the west; that is, to be anywhere positive; that is something I could not say at all. (R. 486.)

Redirect examination:

In the years following the breaking through of the Sand Reef, I did not have to cross with stock there at the Sand Reef. It was all dried up and you could cross most anywhere. (R. 488.)

Mr. BLACKMAR. Q. That is, you mean you could cross the lake anywhere?

A. Yes; down in that part of it. And then that crossing came in up at the Narrows, and that stopped, and that was out of our route to go that way.

Q. Approximately when you get these real small floods in there, how long does the water stay on the ground? (R. 488.)

A. Well, there is a great deal of difference. It has got so lately that the water goes off early. When the water is light, we cut our crop tolerably late.

Q. What do you mean by tolerably late?

A. We cut our hay in the lake, because the water didn't get away, and it would be too wet.

I have cut hay there in August, in September, in October, and in November. It was that far apart. (R. 489.)

Mr. CHAUNCEY CUMMINS, called as a witness for the plaintiff, testified in substance as follows:

I returned to Harney Valley in the very last of April or the first of May, 1881 (R. 493), but I only stayed here ten or twelve days and went back again. At that time I passed around the east end of Malheur Lake, by Windy Point, on my way to Happy Valley. There was a road there at that time and I could see Malheur Lake from that road. I really didn't look at the lake from that road, except at a distance, and the distance from there to the water would be a guess. It was half a mile or a mile, perhaps; I didn't take my stock to water there. (R. 492.)

Mr. PRIM ORTEGO, called as a witness for the plaintiff, testified in substance as follows:

I have seen Malheur and Harney Lakes almost every year in the spring, fall, and winter, since 1877, up to the late years. In 1877 I was on the south side of Malheur Lake. (R. 499.) When I first came to the country the water was pretty high, by that I mean that at that time there was considerable water; and I have seen it right up there pretty close to the Narrows where the store is, right up to the Hembree place. I do not know what the Hembree place is called now. There have been different parties who have had it, but I don't know who has it now.

I remember the old dance hall at the Narrows and the water has been up to where the old dance hall was, but that was before the building was there. I never have seen it to the floor there at the time the building was built, but it was before that. (R. 500.) I have seen the water that high a good many times. That was before the Sand Reef broke through, and I have seen it afterwards too, but I do not know that the water was quite as high as the first time I saw it.

Before the Sand Reef broke through, my work took me into Malheur Lake most of the winter, every winter in connection with the cattle. It also took me to Mud Lake. (R. 501.)

From year to year, practically every year, I have been in Malheur Lake with the cattle. They would go in there in the winters when it would freeze up, either to take cattle in or get them out. In the earlier days they couldn't get in there, because there was too much water. (R. 502–503.) That was the condition before and (R. 503) after the Sand Reef broke through. I have never had any of my horses break through the ice with me, but other fellows have. I cannot tell how far the water would come up their horses because where it broke through would be mostly in these sloughs. (R. 503.) I have seen some of these sloughs that you could swim a horse in.

Mr. BLACKMAR. Q. And did you ever see any cattle drown down in there?

A. I don't know whether they drowned, but they got mired down there and died.

I have been in there after cattle when the spring break-up came and it was necessary to put a rope on them to help pull them out. When I was engaged in doing that I guess lots of places were pretty solid, and some of them pretty miry. (R. 504.)

I remember the mail box that was at Windy Point in the early days. (R. 506.) It was on the high road there. The closest I have seen the water to that road, that is plumb up on both sides of Windy Point, the water would whip around; at Windy Point it was a little higher there. There was a bank on the lake and the water never got there. The highest water I have seen has been right up to the bank, and sometimes it went over the bank and then the water would whip around on both sides of Windy Point. At that particular part of the lake, certain seasons of the year would get pretty hard winds and I have seen the waves come up and slash towards Windy Point. I have seen the waves at the edge of the lake (R. 507) hit a horse on the nose. The distance from that road to the lake was in the neighborhood of maybe a mile (R. 508) and a half; might have been farther; cannot tell.

There are two roads up there at Windy Point. There is a high-water road, and then there is a road when the water went down. The mail box was the high-water road. I have seen the water there close to the high-water road. (R. 508.)

In my experience down there on these lakes, I have seen all stages of water at all seasons of the year; I was there pretty near all the time. I have seen considerable difference between low water and the high water there.

Mr. BLACKMAR. Q. I presume in some places it is several miles, isn't it?

A. Yes, sir. (R. 513.)

I have not engaged in cutting hay (in Malheur Lake); I looked after the cattle. I have seen lots of stacks of hay on the old lake bed in Malheur Lake. The company never had any hay there; their hay was on this side of the present meander line; but I have seen hay of other parties in there (in the lake bed). (R. 516.)

Cross-examination:

After the Sand Reef broke through, we had lots of water in the early days; the water started to go down different times; sometimes it was lower early, sometimes later.

Mr. LILJEQVIST. Q. During the rise in the spring, the ordinary rise in the spring, where did the water come with reference to Windy Point?

A. It comes pretty close to Windy Point.

The water of Malheur Lake would come at Windy Point where the well is; there is a high place there (R. 520); the wind whips around both sides of Windy Point, can see the water on both sides; right at Windy Point it is a little higher there, the water does not come up there; on the north side it was lower, and the water went around a little closer there than it would right straight at Windy Point.

Mr. LILJEQVIST. Q. Did it do that for a good many years in the spring?

A. Yes, it would do it.

Q. About the ordinary water, where did it go?

A. Well, it didn't go so far.

I could not tell how far it went from Windy Point; might have been half a mile, a mile, or more; might have been less; cannot answer that question. Used to water our horses or stock there at Windy Point.

Mr. LILJEQVIST. Q. And you did that for a great many years after the Sand Reef broke through, didn't you? (R. 521.)

A. Yes, sir.

Q. Until the well was built?

A. That well was there before anything like that.

Q. Oh, the well has been there from the earliest time, has it?

A. Not so very early, but I have seen that well there that they watered stock with before and afterward.

The water was a little farther away from the well.

I am familiar with the Sodhouse Springs.

Mr. LILJEQVIST. Q. After the Sand Reef broke through (R. 522), where did the water come at the ordinary high-water season at the head of the stream?

A. I guess pretty well up on the banks of it. (R. 522.)

Mr. LILJEQVIST. Q. Well, now, south from Pelican Island there is a strip in here which they call Cole Island. Now, don't you remember anything about that island?

A. No, I don't remember, because I just went as far as Pelican Island, and I never went much farther. I just drove stock out of there, that was on that island.

When I went there, there was very little water between Pelican Island and Windy Point; that is before you got to the island; I didn't go in there on the ice; I went when it was not freezing weather.

Mr. LILJEQVIST. Q. In ordinary springtime when the water came up around Windy Point, it was nothing but a vast body of water between Pelican Island and Windy Point?

A. Yes, there was quite a body of open water there.

Q. And southerly from Pelican Island—I mean westerly, off towards the Narrows, that was all open water, too, wasn't it?

A. Yes, sir. There was some tules in places, but mostly all open.

Q. It was mostly open down until you got to about the line where the Silvies and the Blitzen (Rivers) ran into the lake?

A. I don't know just exactly where the Silvies (River) runs into the lake.

Q. Where the Blitzen (River) runs into the lake then? (R. 524.)

A. Yes, and beyond that.

Q. And beyond that?

A. Yes.

Q. The open water extended somewhere westerly along the line where the Blitzen entered the lake, is that correct?

A. I have seen it away beyond there. There are a lot of tules over there by Dunn's.

Q. When you got on a hill, and looked out you saw a lot of open water?

A. Yes. (R. 525.)

During 1877–1878 was the high-water mark, and it has never been up to that.

Mr. LILJEQVIST. Q. It has not been up to the 1877 and 1878 mark?

A. No, sir; it hasn't. (R. 530.)

Q. Now, how high, after the Sand Reef broke through, did the water come up on to the bank in Springer's Spring, in the ordinary springtime of high water?

A. Well, I have seen that spring very high for a good many years.

I know where the meander line is on the Reinemann place.

Mr. LILJEQVIST. Q. Do you know how high the water would come in ordinary high-water seasons on that meander line after the Sand Reef broke through?

A. I have seen the water right up to the house. It was low, and during high water I have seen the water come up to the house. (R. 531.)

That was the old Reinemann place, but I don't know who owns it now. (R. 531.) (The old Reinemann place is in the southeast quarter of the southwest quarter of section 29, T. 26 S., R. 31 east, south of the lake. Pecore. R. 532.)

Mr. TOBIAS STILLEY RIDDLE, called as a witness for the plaintiff, testified in substance as follows:

In December, 1873, I was down to Malheur Lake and crossed it, riding my own stock; there were three of us who crossed Malheur Lake with two pack horses, about half a mile from the mouth of the Silvies River; we came out at the Sodhouse Spring where the Sodhouse was built on the south side of Malheur Lake.

At about the center of the lake, we broke through the ice; the water was about 2½ feet to 3 feet deep; we had no trouble in getting the horses out of the ice; we rode right out. (R. 538.) The reason we crossed Malheur Lake that time was because we had to get the cattle out as the snow was awfully deep, and we were hunting a country where there was no snow. The snow was about four inches deep on the ice; we rode out on it that evening and concluded we could make time by going right straight across the lake. I was around Malheur Lake from 1872 to 1884. (R. 539.)

In December, 1873, was the only time I broke through the ice on Malheur Lake; later I crossed it several times on the ice but did not break through any more. I was not afraid of it after finding out how deep it was.

We ran our stock in the tules and they ran all around the lake on the ice from the Blitzen—the mouth of this river, around the lake; generally speaking, clear around this side. (R. 540.) Very few ever got on the end of the lake toward Mud Lake. That was a little out of my range. We let the stock run loose, and they would generally stay there. We gathered them in in the spring and started them toward home. (R. 540.)

Cross-examination:

I can not tell you exactly where the water came in ordinary springtime with reference to the Sodhouse; there were banks along there by that Sodhouse Spring; and I can not tell you where the water came with reference to those banks.

The only settlers around Malheur Lake at that time (1874) were Chapman and Weaver.

I do not know a place named Ted Dunn's.

I do not know where the town of Lawen was; that town was not there in 1874. (R. 544.)

Mr. LILJEQVIST. Q. Now, in this western part of the lake from the Blitzen and the Silvies Rivers, west toward the Narrows, what they call islands, what were they, just tule patches?

A. Well, I wasn't much acquainted with that country. I never rode in there much. I rode this other way. It looked to me like a swamp and tules, yes.

I never was in there much; I rode across the lake there once. (R. 545.) I am not acquainted with that part of Malheur Lake from the Blitzen (River) to the Narrows. I hardly ever went over that part. The part that I rode in was mainly open water. (R. 546.)

I am familiar with Saddle Butte; I was not right there in the springtime; I could not tell you where the water came with reference to Saddle Butte in the ordinary springtime; pretty near there I guess. I do not think Malheur Lake was ever up as high after the Sand Reef broke through as it was before. (R. 547.)

Mr. GEORGE E. WHITING, called as a witness for the plaintiff, testified in substance as follows:

At one time I was clear out in Malheur Lake riding in a skiff—a rowboat. I can't tell just exactly the place, but it was on the north side of the lake, this side of the Narrows. There was a party there by the name of Adams whom I visited there. We had taken a house on a wagon and moved it from the town of Burns before the ground thawed out; it would freeze up nights enough to carry the wagon, and that was the time I went around there in a boat. (R. 553.)

I can not tell you the depth of the water in there at that time; I did not pay much attention to that. We had a homemade boat with a flat bottom. We used poles and oars. It all looked like a watery grave to me at that time because I was a young fellow. It didn't look so enticing. (R. 553–555.)

In 1900 (R. 555), together with four or five others, we took a bunch of cattle (R. 556), which had been the subject of litigation at the term of court, down to Malheur Lake and across it practically through the center between the Sodhouse Field and the Swan Lake Field (from the south side to the north side of Malheur Lake). (R. 555–556.) We crossed Malheur Lake with these cattle during the dry season of the year riding on horseback, and where we crossed there was no water in the lake, and we did not have to swim them at any point. (R. 556–557.) The cattle had the brands worked over them, and as a result of the litigation I think French-Glenn got the cattle and Mr. Henry Blackwell bought the cattle. I remember it quite well. (R. 557.)

I was placed on ranches belonging to the P. L. S. Company at the Juniper Ranch and the Anderson Ranch for about two years. I made a good many trips between those ranches and here at Burns, and in doing so came right across the east end of Malheur Lake, and passed the well at Windy Point. Windy Point derives its name because of the wind that blows there. (R. 558.) The wind had considerable effect upon the water. Our prevailing wind is from the northwest, and Windy Point is southeast of Malheur Lake.

Mr. BLACKMAR. Q. Well, approximately how far did the wind carry the water up there at Windy Point?

A. That is a pretty hard question to answer, but during the high water it didn't carry it right up to Windy Point. It didn't carry it up at all, but immediately below Windy Point, and the other side of Windy Point, and if my recollection is right, this side of Windy Point, probably half a mile either side, why, the wind would carry the water up quite a distance.

Q. Well, now, could you put that phrase "quite a distance" into feet? Could you estimate how many feet it would be. Was it as much as a matter of a mile or a quarter of a mile?

A. I think a quarter of a mile would be a pretty big estimate of it. When the wind would die down, of course, the water would recede. (R. 559.) During the two years I was over there, I have seen the lake at just about all stages of the water, and it has changed considerably. (R. 559–560.)

Cross-examination:

At the time I went across the bed of Malheur Lake with some cattle, which was in about 1900 (R. 555), it was a dry season. Nothing was frozen. I am satisfied it was somewheres near 1900. (R. 560.) It was a very dry year.

Mr. LILJEQVIST. Q. That was a very unusual condition, wasn't it?

A. I think it was. (R. 561.)

When I went boating (with Mr. Adams) we visited two or three cabins there (in the west end of Malheur Lake); I cannot describe the land the cabins were on. The tracts were not much more than an

acre in extent, others larger. There was water all around and salt grass on top of the land.

Mr. LILJEQVIST. Q. And about how high above the water as you came up to (R. 561) them in the boat was the land on which the buildings were?

A. Well, they weren't very high.

Q. Just a foot or so?

A. I doubt if it was any more than a foot; it was right low.

Q. In ordinary wet seasons wouldn't those places be covered?

A. No, sir; I don't think so, because I think that was an ordinary wet season. (R. 562.)

Q. And it just barely extended above the surface of the water?

A. Yes, sir. Possibly some of them were driven out of there.

We visited only two or three people there; the settlement was young at that time, and the settlers were just commencing to go in there.

Mr. LILJEQVIST. Q. And those islands were nothing more than decayed vegetation, such as peat, and decayed tules, and decayed swamp grasses that had risen above the water, isn't that correct?

A. No; I don't think it is.

Q. What was it then?

A. I think it was nature's own product. Of course, (R. 562) that would be nature's own product too, but a salt-grass knoll is what I would call it. (R. 563.)

When I went in there and visited these cabins it was in the early spring of the year; I do not know exactly (R. 563); there was no ice there; we rode around these places in a boat (R. 564).

Mr. LILJEQVIST. Q. Are you prepared to say the water didn't go higher than that particular season?

A. No, sir.

Q. Do you know whether you were there at an ordinary spring?

A. Probably.

Q. Now, how high above that water was the highest places where you found these people had put their cabins? (R. 564.)

A. I wouldn't undertake to say. Possibly a foot; or possibly a foot and a half. The land slopes quite a bit. There is a natural slope to these lands, and those islands toward the water.

Q. And you rode right up to them in a boat?

A. You possibly would have to get out and pull the boat up, or else get up a little steam and speed it up pretty good; and I think Mr. Anderson had a pair of high-top boots when he pushed that boat.

There was a little salt grass on top of that land; do not remember any sagebrush or greasewood there (R. 564–565); there were some tules around the edges of the island.

I went in there at other times afterwards through that area. It was during the dry season and practically all of the land was un-

covered at that time. I do not remember the year but it was after the time that I went across Malheur Lake (with the cattle).

Mr. LILJEQVIST. Q. There was a great deal more water in this lake in the early days than at the time when you went in there, wasn't there, or than there has been recently? (R. 565.)

A. I think there was. (R. 566.)

Q. Now, you have made some distinction in your testimony about the flood waters of the Silvies, and the back water of the lake. Did the back water of the lake ever go over the Red "S" Field?

A. I couldn't say. After the water quit running down, the water could have run back up there.

Mr. LILJEQVIST. Q. Wasn't there a lot of that water that backed up there and kept the ground wet so that they could raise hay crops?

A. I suppose so.

Q. There is more or less silt which is brought into this (Malheur) lake from these streams, isn't there? (R. 566.)

A. Evidently.

Q. And you could see that silt deposit upon these lower spots, couldn't you, that were uncovered; and these spots were uncovered during the dry season?

A. Yes, that is evidence.

Q. Wasn't there every evidence that the Blitzen and the Silvies (Rivers) had been carrying sediment into the lake for years and years and years, and gradually building the thing up?

A. Yes, sir.

The Bennetts and Adams lived northeast of the Narrows on the north side of Malheur Lake; can not say if they were on the meander line, or if it was deeded land, or down in the lake; I am unable to locate them, and I do not know who owns those places now. (R. 567.) There was not a bank there along that place that I know of. (R. 567–568.)

Mr. LILJEQVIST. Q. Now, in the early days, when you first went there, there were enormous amounts of water that came down, and the country was flooded, isn't that true?

A. Yes, sir.

Q. Do you know, as a matter of fact during those spring floods, you could get over the top of a lot of tules in a boat?

A. Yes, sir. Not only on the lake.

Q. Also on the river?

A. Yes. (R. 570.)

Q. And the flood waters of the river?

A. Yes.

Q. As a matter of fact, you could start out from Burns, and you could go down to the lake in a boat in the flood waters?

A. I never tried that.

Q. And all that water went into the lake, didn't it?

A. Yes, sir.

Q. And there has been a vast amount of that water taken away by irrigation in the Silvies Valley, isn't that correct?

A. I can't hardly agree with those things, because when the vast amounts of water would come, we would have a larger area, you might say, watered, than we have had since we have gotten artificial irrigation.

Q. It is a fact that for a great many years past very, very little water got into the lake from the Silvies River?

A. Due to the shortage of rain and snowfall. (R. 571.)

Q. Well, whatever water there is in the river is used up here in the alfalfa fields of Burns, isn't that correct, and on the fields down towards the lake?

A. Yes, sir.

Q. And for quite a number of years past very little water has been able to get down to the lake at all, isn't that correct?

A. I suppose it is, but I haven't visited the lake to any extent within the past couple of years.

Mr. BLACKMAR. Aren't you going into something there that hydraulic engineers differ about? (R. 571.)

Mr. LILJEQVIST. I don't know.

Mr. BLACKMAR. I think it is rather a tough problem, to put up to lay witnesses, something that engineers can't say. (R. 572.)

Mr. EMIL BAKER, called as a witness for the plaintiff, testified in substance as follows:

In connection with my cattle work, I have had occasion to go in and about the lakes; from time to time I have gone into these lakes in the winter to get cattle out; I operated all around these lakes.

I have been across Malheur Lake; I have crossed the lake where there was some ice; I have had occasion to cross it when the lake was pretty dry; I would not say exactly the years, but along about 1917–1918 it was very near dry. (R. 589.)

The main crossings for crossing Malheur Lake with stock would be about straight south from the Red "S" Field to what is called the Sodhouse. It might be a little east of south; I have been across there when it was dry; when it was tolerably wet, and when there was some water through there.

When I would be crossing the lake in that time of the year, the water was more in the middle of the lake. At the times when I crossed Malheur Lake when it was dry, or when it was mud, or when there was not sufficient water to interfere with the crossing, I would cross about a mile to the east of the Howell oil well. (Mr. PECORE. The Howell oil well is located in section 5, T. 26 S., R. 32 E., right near the border between lots 2 and 8.) (R. 590–591.)

After crossing Malheur Lake, we would go out on the south side tolerably close to, or about a mile from what was called (R. 591) Springer's place, where Alva Springer now lives. (Mr. PECORE. Alva Springer's place is in lot 8, section 35, T. 26 S., R. 31 east, south of the lake.) (R. 591.)

When I was there in Malheur Lake with cattle, from time to time, once in a while, some cattle would be lost through the ice.

I was in the court room when Mr. James Thomas Baker testified that cows give up pretty easily, and sometimes drown in very shallow water. That has been my experience with them. (R. 592–593.)

From time to time I have had occasion to use the road that passes by Windy Point. I have never seen the water of Malheur Lake over the high road at that place. The best estimate I can give as to how close the water of Malheur Lake came to that high road would be anywhere from three-quarters of a mile away, maybe further. (R. 593.).

I know the place out from Windy Point where there is a short step-off of about a foot and a half, or two feet. I have never seen the water over that step-off. (R. 593–594.)

It has been my experience with Malheur Lake, over the period that I have known it, that the level of it during high-water changes from year to year. I can not say that it has any fixed point (R. 594–595), that it reaches in any year?

Mr. BLACKMAR. Q. And there is quite a spread between the point that it comes up to from year to year, is there not? There is quite a difference?

A. Oh, yes, sir; there is.

Q. Now, during dry seasons, the amount of recession (R. 595) that it recedes changes from year to year?

A. Yes, it does.

Q. So that you cannot tell from one year to the next how far it will recede?

A. No, sir; I don't think you can tell anything about that from one year to the other. (R. 595.)

I have cut hay down in Malheur Lake; this was on the south side of it. (R. 597.) I have helped cut hay right there adjoining Mr. Alva Springer's Ranch; and out toward the lake, and clear down to the lake about as far as they could go; we mowed the hay within about a quarter of a mile of Mr. Springer's house and then run north for about two miles. Might have been farther than two miles that we mowed some hay. From time to time, others in the past have cut hay beyond that point. That hay was stacked in there, and left in the stack, and we built a fence around it to keep the stock out. That hay is fed in the wintertime right on that ground, at the spot where it is stacked. (R. 598.) The cattle are out there in the tules and they have fed right around these hay stacks; most of the ranchers there have fenced off one from another and so that they do not feed other people's cattle. Those fences are right down there in the lake bed. If they don't feed all the hay that is cut in one year, they allow it to stay in the stack from year to year, and it might remain that way for two or three years, or it might be longer. I do not know how long they have had hay to stand there. That hay did not rot very bad. (R. 599.)

Cross-examination:

From the time that I have known Malheur Lake, there (R. 599) have been a great many thousands of cattle on that lake in the win-

tertime and in the fall. The settlers have been cutting hay, and cutting tules, and burning tules for a great many years. I do not know that there has been as many as one hundred thousand cattle on that lake in the past, certainly not that many at one time.

Mr. LILJEQVIST. Q. Some witnesses have given estimates of that, that is about it, is it?

A. I don't know.

I cannot say the maximum number of cattle there were that were in there, nor can I say whether pasturing cattle in the early days over that kind of soil would tramp it down and harden it and make it firm. I have not observed anything of that kind at all, and could not say that it would, or that it would not. (R. 600.)

I cannot tell the area of land in Malheur Lake that was covered and uncovered between high and low water. I could not say how much land there was; do not know anything about it down there; nor could I tell you how much of it would be uncovered or covered in the normal season along the edges.

Mr. LILJEQVIST. Q. If they did not have water, they would not have grass there, or hay, would they?

A. No, sir; I don't think they would.

Q. And the same thing with the deeded lands around the lake, they had to have water back up the lake in order to get (R. 601) hay there too, didn't they?

A. Well, they have to have water.

Q. There were a great many years that you could not even get down to the lake to cut hay, isn't that correct?

A. Yes; I guess there were years that they could not cut hay.

Q. And many years they could not get down until September to cut it; isn't that correct?

A. Yes. Some years it was late before they could go (R. 601) back in there.

I cannot tell exactly how high those islands (in the western half of Malheur Lake) would extend above the water, but what I would call those islands (in the western half of Malheur Lake) is where there would be channels of water going around; the water would all go around and then be around in channels probably.

Mr. LILJEQVIST. Q. The water would go off these little high places and be down in the channels?

A. Yes, sir. There would probably be water in the lower places.

Q. Well, when the water was up, would it cover these high places, and did they raise grass on them?

A. A lot of them, yes, sir. It would cover those. (R. 602.)

I don't know where the Neal meander line is and I know nothing about it. (R. 603.)

I know some of the deeded lands on the west end of Malheur Lake. (R. 604.)

Mr. LILJEQVIST. Q. And those deeded lands require the water to back up to make those lands available for hay crops, don't they?

A. I could not say as to that, whether the water has to back up to go over this land or not.

Q. It has to get over it some way?

A. Yes; it gets over it. (R. 604.)

Mr. LILJEQVIST. Q. And around that entire lake (Malheur) one of the ways you determined where the waters come along that country from time immemorial was the rim of the salt grass along the outer edges of the lake?

A. Yes, sir.

In the springtime, the water with reference to the town of Lawen, was quite a little way below that town; cannot say how far; believe it would be three or four miles anyway.

I have seen water around Saddle Butte in the springtime. (R. 605.)

Redirect examination:

We used mowing machines for cutting the hay down there. Mowing machines have been used for cutting hay ever since I have known anything about it. (R. 607.)

Recross-examination:

They used mowing machines all over that lake.

Mr. LILJEQVIST. Q. There is many and many a year you could not get a mowing machine in there at all, isn't that true?

A. Some parts of it I guess they couldn't. (R. 607.)

Mr. JAMES M. DALTON, called as a witness for the plaintiff, testified in substance as follows:

I have not done any haying down there at Malheur Lake, but I have been in there after stock in the wintertime when it was frozen over. I was in there south of Lawen and south of the Catterson place, and pretty well out, and it was frozen then. There was snow. I was riding for cattle then.

I am familiar with the Springer place. There are two of them, but they are probably ten miles apart. I was not riding out that side of the lake for stock, but I have been there hunting fowl. I have been farther out in the lake from the Ed. Springer place than I have been from the Alva Springer place north; the Alva Springer place is where the Sodhouse Spring is. (R. 610–611.)

(NOTE.—The Alva Springer place is the (Lake Malheur) Reservation Headquarters, and so shown on the map, Plaintiff's Exhibit No. 3, and is situated in lot 4, section 35, T. 26 S., R. 31 E. The Ed. Springer place is where Alva Springer lives, and it is in lot 8, of the same section, township, and range as the other place.—Pecore.) (R. 611.)

I am familiar with the place known as the Howell Oil Well on the north side of Malheur Lake. While hunting fowl, I have proceeded quite a distance farther south of the Howell Oil Well (in toward the center of Malheur Lake). (R. 611.)

Mr. BLACKMAR. Q. Now, coming out from the Howell Oil Well, and coming up from the Springer place, would you say you traversed the entire part of the lake there?

A. No; I didn't get that far north when I was on the side next to Springer's; I didn't get as far as Springer's when I was hunting. (R. 611.) I was hunting in the fall of the year, and the lake was not frozen over; there was open water there. I never used the boat there, but I did at Springer's a little bit, just across some channels that were too deep to wade.

Q. Coming in from the north you used boats?

A. We did at the Howell place. Well, I guess that was the only place. I hunted some down by the Adam George place, but I don't think we used any boats to go out to where the shooting was. (R. 612.)

When I was in Malheur Lake in the wintertime, the ice never broke with me, and I do not remember of seeing any of the other men of the party breaking through the ice. (R. 613–614.)

Cross-examination:

Mr. LILJEQVIST. Q. Down in the western part of the (Malheur) lake. I want to know what you know about the ordinary high water in the ordinary (R. 616) season of the year.

A. The water was out there when I was out there one time pretty close to the Howell house.

The Howell house was where this oil well is that (R. 617) I have referred to, but whether it is out on deeded lands or not I can not say. (R. 617.)

Mr. LESTER MARION HAMILTON, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Have you had enough experience with Mud Lake and Malheur Lake to be able to tell me whether or not the water surface and the area of the water surface changes a good deal from year to year?

A. I never saw two seasons alike. There was always a difference. Around the outer edge during that period of three years that I spoke of first, between the tules and the outer edge was a portion of land which they called hay land, and if the water receded enough they cut hay right up to the tules. If the water didn't come out past the tules, why, there wasn't any hay. During those years they cut that hay, but it was not the same any of those years.

Q. Did the depth of the lake remain approximately the same at all seasons of the year?

A. No.

In the high-water season there would be more water in the lake and more depth. (R. 631.) I can not tell the spread of the water between the depth at low water and high water; each year saw a little different run-off. (R. 632.)

That part of Malheur Lake that I was on in a boat was all shallow water, except in the channels, and they were not very deep. (R. 632.) The usual season of the year that hay is cut down in Malheur Lake is along the latter part of July, or the first of August; it depends a good deal upon the rapidity with which the water recedes in the lake; the low point of the water changes from year to year; it recedes farther some years; I have not seen two years similar. (R. 633.)

Cross-examination:

The difference in the rise and fall of the water in Malheur Lake, or the difference in the spread, would be about the same as Mud Lake, from one-quarter to one-half mile. Malheur Lake had the same slope to the left because Malheur Lake and Mud Lake were pretty closely connected with channels. (R. 635.)

The same ice condition that existed at the Narrows also obtained in the eastern part of Malheur Lake with reference to skating, except that we could not do so when the snow became too deep. (R. 637.)

Mrs. Ollie Darsey, called as a witness for the plaintiff, testified in substance as follows:

When I was a child, my father was working on the Island, and I went down with him several times to where they were swamping cattle out in the swamps; I was always riding horseback; I had no playmates so I rode with father. Sometimes we would go out into Malheur Lake quite a ways, I would say (R. 652) four or five miles, and other times not quite that far (R. 653).

I have seen the men and cattle break through the ice on Malheur Lake at times.

Mr. Blackmar. Q. And though you were a child, your father did not have any fear about your getting drowned out there?

A. Oh, no; there was not water enough to drown. (R. 653.)

Since I have lived in the neighborhood of Malheur Lake, it has been my observation that the area of the lake would change some years; other years it seemed to me like it didn't change so much; every year there was a considerable recession of water, and the last few years there has been a great recession and it is almost dry.

With the coming of the spring run-off, we usually got a rise in the water of the lakes; the extent that it rose depended a good deal upon the snowfall in the mountains; some years that was pretty slim; other years it was better. It has been very slim in the last two or three years. (R. 655.)

Cross-examination:

Mr. Liljeqvist. Q. How much difference was there between the normal high waters and the normal low waters of the lake?

A. I could not say. That would be a hard question to answer. It would depend according to what our rainfall was, or what our snow was in the winter, as to how much the lake would fill up.

(R. 658.) I was only there three times and it didn't look to me like there was more than a hundred yards difference in the width of the water; might have been more or less. (R. 659.)

Mr. CHARLES R. PETERSON, called as a witness for the plaintiff, testified in substance as follows:

In the western half of Malheur Lake there are times that there is quite a little water; at other times there is not. After you get pretty well out of the tules there is considerable space free from tules, that is between Cole Island and the west side of the lake. On the west side of the lake there is considerable open water in it; then you run into tules and they are pretty thick down there. (R. 679.)

At the times I have been in Malheur Lake swamping cattle I have never had my horse break through the ice. (R. 679–680.) I only remember one time of seeing anything break through the ice and that was in the winter. We had cattle, and they got out on the ice, they bunched up on the ice, and it cracked. The water came through the cracks, but it didn't break clear through. (R. 680.)

Mr. CAMPBELL C. KILBURN, called as a witness for the plaintiff, testified in substance as follows:

The area of Malheur Lake changes from year to year according to the precipitation. (R. 736.)

Mr. BLACKMAR. Q. And in many places around that (Malheur) lake when there is water there you can ride out two or three hundred yards and not get much depth?

A. There are such places, yes.

Q. And there are some of them that you can ride out half a mile or so, and not get much depth, except in the sloughs?

A. I think there is. Yes; I think so. Since the lake went down, it is a flat country in places, and you can see the bottom. (R. 737.)

Mr. MARION HORTON, called as a witness for the plaintiff, testified in substance as follows:

In the early days, I had occasion from time to time to pass Windy Point; I remember a place up there which is known as the Stauffer corral. The Stauffer corral was located a little north of west of Windy Point.

I recall the old County Well up there, and the Stauffer corral was west and quite a bit north of that well, but I could not say how far. That well was dug after the corral was up. (R. 1469.) There was no well there; I did not pay much attention how far it was at the time. The well was right close to Windy Point, right close to the hill.

The corral was about half a mile north from the hill.

I recall about a foot and a half bank, step-off, up there at that particular location (near Windy Point). That corral was about 50 yards east of that bank. The corral was used to brand calves in. (R. 1470.)

Mr. JOHN W. BIGGS, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Now, from your personal knowledge of the country, will you state whether or not there has been a great deal of water that has gone into Malheur Lake and Mud Lake that did not flow into the lake through the channels of the Silvies and Blitzen Rivers? (R. 1502.)

A. Yes; there is quite a bit of the water that goes in at different times.

Q. In other words, measurements or estimates based upon those two rivers would not give the complete story as to the waters that flowed into those lakes, would it?

A. No. (R. 1503.)

Mr. JOHN R. JENKINS, called as a witness for the plaintiff, testified in substance as follows:

I have been around Windy Point, and I remember a place up there called the Stauffer Corral. (R. 1812.) It is spelled S-t-a-u-f-f-e-r.

I remember an old well that used to be there near Windy Point.

The location of that corral with reference to the well (Windy Point), I remember the corral best when it was moved out and I understand built on the salt grass, but it has been moved east out to the edge of the sagebrush on an old road that runs from Windy Point to Crow Camp.

The corral was due north from the old well, about a mile or a mile and a half north of Windy Point.

I remember a sort of a little bank out toward the (Malheur) lake (R. 1813) at Windy Point. With reference to the location of that (Stauffer) corral to that bank, the corral was quite a ways out after it was moved out in the sagebrush along this road. It was moved farther out east from the lake. When it was moved out, it might have been three-quarters of a mile, more or less, from that bank. (R. 1814.)

b. 1870–1880

Mr. SCHUYLER WHITING, called as a witness for the plaintiff, testified in substance as follows:

The water in Malheur Lake in June, 1879, was about half to three-quarters of a mile south of where the old town of Lawen used to be. They have moved the town up on the highway now. The old buildings are still there and they are away from the road. (R. 175.)

Mr. JOHN GARDNER, called as a witness for the plaintiff, testified in substance as follows:

I first saw Malheur Lake in June, 1878. We watered our horses there, about a quarter of a mile, or a little better from Saddle Butte toward the lake, and stopped for over half an hour, then went on.

At Saddle Butte there was an old road at that time which we were following. The water of the lake at that time was about a

quarter of a mile from the road at Saddle Butte. We swam Malheur Slough and watered the horses right there by the Butte right out by the lake. There were no bridges there then. There was quite a little bit of water running in there at that time. (R. 266.) This was along about the 15th or 20th of June (1878). (R. 267.) The water of Malheur Lake was about a quarter of a mile, maybe less, maybe more, but at any rate, a substantial distance from the high road at Windy Point at the time we were watering our horses there in 1878. (R. 279.)

Mr. TOBIAS STILLEY RIDDLE, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I was around Windy Point in 1874 to 1884.

Mr. LILJEQVIST. Q. Where did the water come up in the ordinary springtime around Windy Point?

A. I would have to make a guess at that. I should say it would be a quarter of a mile, pretty nigh. (R. 543.)

Mr. JOHN H. WITZEL, called as a witness for the plaintiff, testified in substance as follows:

I have been around Malheur Lake a good deal; I was there on the east side of Malheur Lake in 1878, along the borders of the lake there for several miles, and then I was back there again about 1885.

I have driven cattle across the west end of Malheur Lake, through there a good many times, in the fall of the year principally, and the winter. (R. 1097.) The cattle that I drove across there were just small bunches; I went through there with probably 150, or maybe 75 or 50, or 2 or 3, such as that, just as I happened to have them.

I cannot recall any specific years that I went through there; I went through there off and on with cattle so many times I don't know that I could recall a specific year that I went through there.

The first time I made a drive through there was with a wagon; I may have gone through and looked for the road a few days before, but I was moving to the John Marshall place at the (Malheur) lake to winter my cattle and I went through there with probably 75 or 100 cattle. I went from the north side in there to where Mr. Haley lives; what they call the (R. 1098) Haley place; it is about south of the Red "S" Field. I came out of the (Malheur) lake on the south side, where the Reinemann ranch and the McCoy places are located. (R. 1099.)

(NOTE.—The Reinemann Ranch is marked on Plaintiff's Exhibit No. 3. "A Reinemann," in the southeast quarter of the southwest quarter of section 29, T. 26 S., R. 31 E., south of the lake.—Pecore. R. 1103.)

That would be west and north of the Sodhouse; the east line of the Reinemann place would run pretty close to, or hit the Sodhouse Field.

When I came through (the west end of Malheur Lake) on that occasion, there was a pretty plain road through there. (R. 1099.)

I did not get stuck in the mud with my horse and wagon. I think that trip I made was in 1903.

I crossed the lake with the cattle from a little east of Swan Lake where we went through, and then we went right through south of the Swan Lake, through and by the Haley place, and we would come out (on the south side of the lake) a little west of Mr. Springer's place, and through in there where Mr. Hughet used to live, along in there (R. 1100) or at the ranches that join the Sodhouse Field. (R. 1100–1101.) In taking these cattle through there, we never lost any on account of them being drowned in water. We followed a fairly well defined trail through there, and the tules and grass would be broke down so that it was a pretty good trail.

I have driven cattle past Windy Point, and we watered there at the lake, in the vicinity of Windy Point. (R. 1101.) I remember the old county well that used to be there near Windy Point and I drove these cattle to water in the lake about a mile, or a mile and a half from that well (toward the lake).

I have been at Windy Point at different seasons of the year, but not such an awful lot with cattle.

Mr. BLACKMAR. Q. Do you always find the water in Malheur Lake in the same place as you pass there, or would it change from year to year?

A. When I first went up there driving cattle, it stood at that stage I suppose for quite awhile, but later on the water would dry up way back, but I never drove any cattle there then, but I have been by there a great deal.

I have lived near the lake; I lived on the Reinemann place, and I rented the John Marshall ranch where I also lived; I lived on a place they call the Simmons place now, I believe. (R. 1102.)

I do not know how many years I had that place rented, but it was for four or five years. I think the first year I rented it was either in 1904 or 1905—1904 I think. It was practically all hay land wherever the lake would rise. The water we got on the land would be only the backwater we got from the lake. (R. 1103.)

There was a little water when the lake would fill up that drifted through from the Blitzen River that way. It would hold it up until it went across. Instead of going straight into the lake it would push it back on this low land.

During the four or five years that I was there, I did not get water every year on that place (the Reinemann place). (R. 1104.)

The year I had the Marshall place rented there was water on it.

The Alfred Marshall land was north of Alva Springer's place and between that and the Bill Marshall ranch. (R. 1104–1105.)

Mr. PECORE. I am quite sure that that is the land that is now owned by the Hill Brothers.

A. I think so.

(NOTE.—The John Marshall land is in the north half of the northeast quarter of Section 34, T. 26 S., R. 31 E., south of the lake. The

house is indicated on the map, Plaintiff's Exhibit No. 3.—Pecore. R. 1105.)

I also lived on the Simmons ranch. That is right due west of the John Marshall place, it joins it right on the west. (R. 1105.)

I think it is owned by the Hill Brothers, too, but I would not say for sure.

(NOTE.—From his description, it would be in the northwest quarter of Section 34, T. 26 S., R. 31 E., south of the lake.—Pecore. R. 1106.)

I had the Marshall place one year, and the Simmons ranch for one year, and I had water on them both years. I had these places different years, and not both the same year. At that time there was a good deal of hay cut all through there in Malheur Lake itself.

Mr. BLACKMAR. Q. Since 1900 do you think there has been any year that there has not been hay cut in Malheur Lake within the Neal meander line? (R. 1106.)

A. I could not say that there ever had been any year that they didn't cut some hay. (R. 1107.)

Cross-examination:

I crossed Malheur Lake with the stock right south of Swan Lake, and west, and I could go either side of Swan Lake. When I got to the south of Swan Island, I would bear south of Swan Lake, one trail bears a little to the southeast, and another trail went off to the southwest.

I do not know where Mr. Vickers' or Mr. Huffman's places are.

Mr. LILJEQVIST. Q. On this map (Plaintiff's Exhibit No. 3) about a mile and a half, or a mile and three-quarters practically south of Swan Lake, is another depression that I assume also was a lake in the tules in those days. (R. 1115.) Do you remember anything about that?

A. There was a little pond of water out there, but I never heard any name for it. When I went with the cattle, I went on both sides of it.

There is a little pond of water up there by the Joe Hill place, pretty near south of Swan Lake, or a little southeast of it.

Mr. LILJEQVIST. Q. According to this map, (Plaintiff's Exhibit 3), at the present time there is a roadway where they crossed the lake to the east of Swan Lake, and then practically due south to a point where the Vickers house and the Huffman house is shown on this map, and then the road proceeds on the Rye Smyth ranch to the south of the (Malheur) lake. Do you know how that road compares with the way you crossed there in the fall and winter on the ice? (R. 1116.)

A. No, I don't; I haven't been in there for a good many years; I don't know where they have got their road made. (R. 1116.)

There was more water in the early days than there has been in the last twenty-five years. The country has been drying up for the

last 35 or 40 years right along all the time as I have noticed. (R. 1117.)

Mr. MARCELLUS B. HAYES, called as a witness for plaintiff, testified in substance as follows:

Quite a number of times I have been across Malheur Lake off in the Narrows country and Swan Lake and across to the Sodhouse country, going south from Swan Lake. I went across mostly on horseback, riding after stock. (R. 1203.) Up until the last seven to ten years, I was across there mostly every year sometime during the season. We ran stock over that part (of Malheur Lake) and our cattle ranged in the country and sometime during the season we would be over there in that country (western part of Malheur Lake) riding after cattle.

In the early days, the cattle just roamed through there at will. They were not confined to any country there. Even the people locating there had lots of land that was not fenced, and the cattle went any place, especially in the wintertime. There is a trail, as you might call it, that goes from Swan Lake south (across Malheur Lake) and passed Joe Hill's place, that has been used off and on several years. I do not know how many. It has been used for 30 or 35 years, maybe longer than that, but it is a common way to go through there. I have been through there when there was a little water in the channel, and I have been through there when it was absolutely dry. I have seen it too when the channel was full.

The time I would be going through there (R. 1204) I was riding with other people in the Lawen country, and we were bringing the Lawen cattle back, in the wintertime when it was frozen over, or in the fall of the year, and lots of times it would be dry, or practically so.

I am not very well acquainted with the Sodhouse, although I have been there a good many times. I could not go into detail as to the Sodhouse country. I do not know anything about the dams that were built in the early days about the Sodhouse. (R. 1205.)

Major JOHN STAFFORD, called as a witness for the plaintiff, testified in substance as follows:

Between the periods of July, 1876 and June 15, 1877, and September 1, 1877 and June, 1878 (R. 1262–1263), I hunted between Camp Harney and Malheur Lake, but I did not go duck hunting down in the lake. I can not tell you how close I went to that lake. I made no mental estimate of the distance at all at the time.

I simply saw large bodies of water, but paid no particular attention to the physical features of them. (R. 1266–1267.)

During the time that I was stationed at Camp Harney I knew personally very well a man by the name of Captain Bendire.

Mr. BLACKMAR. Q. While you were there, do you recall whether or not he pursued any activity down around the (Malheur) lake in a scientific way?

A. Well, he was one of the most celebrated ornithologists in the United States.

Q. And while you were at Camp Harney, do you recall whether or not he was down there at the lakes and pursuing his profession down there?

A. Well, I know he went out several times.

Q. You never happened to accompany him?

A. Yes, I have been with him.

Q. When he went down to the lake?

A. I don't think we saw the lakes. We went where there were weeds and so forth and growth.

Q. On the edges of the lake?

A. I presume it was; yes. (R. 1267.)

Cross-examination:

I did not go down to the Narrows in those days.

I cannot give you any idea of where Malheur Lake extended north and south in those days.

Windy Point is the only place that I can remember (R. 1269), except from a distance.

Mr. LILJEQVIST. Q. Where did you look at it (Malheur Lake) from a distance?

A. Almost in a line south of Camp Harney. That is where he (Captain Bendire) went to collect his eggs.

I do not recall getting up on a hill there.

My recollection is when you were on bluffs south of the opening of the canyon which Camp Harney was situated on, a considerable distance up where we would always take the horses to eat, on a very clear spring day you could see the water.

Mr. LILJEQVIST. Q. That was about 25 miles away.

A. I don't think it was that far.

Q. You could see the lake from that distance?

A. On a very exceptionally clear day, yes.

Q. It looked like a big body of water?

A. At that distance I could not say. (R. 1270.)

Mr. WILLIAM HANLEY, called as a witness for the plaintiff, testified in substance as follows:

My operations with the cattle took me more into the west end of Malheur Lake; then into the Lawen and Island country, as we called it, and the Red "S" Field, and all the other (places in there); but all the country below Wright's Point was very much of a winter country. The country above there was more of a summer country.

In those early days we wanted to raise the cattle on the range to let them do their own picking; we had no idea of putting up hay for cattle; we just put it up for our horses; we were not going into the sweat end of the cattle business. For the number of horses we had, it was not necessary to pick around other places to cut hay for

them; there was plenty of hay. The main thing we looked for was where the good willows were which were used, together with juniper trees, to make what we called "basket corrals."

Down in the west end of Malheur Lake, the cattle benefited some from the shelter afforded them by the tules; the feed is the main part of it always, but the shelter is a good part of it, too. (R. 1353.)

When I first went down into the west end of Malheur Lake, there were no settlers down there at that time. We did not know what kind of a fellow he (the settler) was; and we did not know what he would look like.

The settlers came into the country after the Malheur Indian Reservation was thrown open (to the public) and surveyed (R. 1356) (in 1883) (R. 1357).

Mr. BLACKMAR. Q. When I speak about the west end of Malheur Lake, I am talking about Mr. Campbell and Mr. Pinto Tom.

A. Well, Pinto Tom, he was around here then.

Q. When did they move into that end of the lake and build their houses down there and go to living there?

A. Well, they might have been in there when we found the country. They are real natives of that lake, too.

Q. These people all came in prior to 1890, did they?

A. The settler people did; the most of them. There probably has been a little change in there, but the most of them did. (R. 1357.)

At Christmas time in 1880, we gather for our little holiday parties; there was probably 15 or 20 of us; we gathered at these cabins, and on Christmas night, there was about a foot and a half of snow; it commenced raining and it rained through all January and February, and the water ran flood those two (R. 1359) months. The real water years are those years that it rains; rainy years, and we had them sometimes, and that was one of them. (R. 1360.)

We commenced, according to the common term, swamping cattle about the 15th of January, and we worked continuously that winter until the last of February, and the water kept going higher and higher.

Now (in the early spring of 1880), the lake was backed up about four miles north on that Narrows road, about four miles after you cross the bridge there, about four miles north. The rim is very easily located and the water was (R. 1360) backed out there.

I remember one time during that swamping I had a couple of these boys with me, and we were out locating cattle, and we might have gone in on that little peninsula that is now known as the Narrows—which is known as the Narrows now. We didn't know it as the Narrows then; but we went on that ice to get to some cattle out on the lake; I think we went probably a mile or a mile and a half, through the muskrat nests, and the water was just kind of coming through the ice. It had been rained on so much that it was breaking up, and one of these boys' horses broke through. Well, I know

well that that horse could touch bottom. It didn't keep him swimming all the time; it was right up to the saddle skirt, and we all had our lariats, and we put it around his neck and then spliced them so that we could get pressure on him, and choked him until he skidded out, and he got out on the ice, and then we concluded that we had better abandon the bunch of cattle we were going for, but that (R 1361) is indefinite in my mind. We went around the lake, and we found another island there, and maybe that was the island we were going toward. It had two, three, or four hundred cattle on it, and we tried to run them out on the ice, and we knew if they would keep a running we would probably get them out, but they bunched, and they went down, and drowned all of them. In those times, and in seasons like that, we drowned many cattle.

I do not think a steer would drown until he got water over his head, but it would not be necessary that the water be over his head in a standing position. (R. 1361–1362.)

Mr. BLACKMAR. Q. Well, have you seen cattle work themselves into a position where they would drown in water, say a foot deep by getting their head under water?

A. They have to be pretty well exhausted before they will accept that. Everything fights for life until the last endurance is past. You don't get much gratitude out of a cow, because if you pull her out of a mud hole and get her on her feet, the next thing you had better do is to look out for yourself, because she will hook you for it.

Q. Do you find in getting out of the water down there that a horse will do more for himself than a steer will; that is, has he got more ambition?

A. No; a steer is better than a horse that way. Only once in a while a horse is really good in mud. As a rule, a horse loses his head. The cow has always got its head; the steer has his head, and he will trudge himself through. (R. 1362.)

Cross-examination:

The lake had plenty of water in it in 1879. (R. 1370.)

I was by Windy Point in the early days, and the water, with reference to that place, I would say was a big half mile from Windy Point, but that is only just saying that. As I have it in mind, I never saw the water out on Windy Point road or the old Government road.

Mr. LILJEQVIST. Q. Did you ever see the lake dry between Pelican Island and Windy Point?

A. I never knew much about Pelican Island. I seen Pelican Island, coming across there on a tired horse, and I saw a raven, and I felt sorry for him; it was a hot day, and he had his mouth open, and I thought there must be something wrong with him; that perhaps he wanted some water, and still he was not very far from water; but he was just too full of eggs he had gotten on that island; that was all that was wrong with him; that raven was a burglar.

He was not panting for water, he was too full from what he took away from the other birds.

Mr. LILJEQVIST. Q. This Cole Island is a little bit of a raise that you find in the lake, with salt grass on it, towards the southeasterly part, going in toward where the old Martha Dunn property (R. 1373) used to be. Let me indicate it to you on the map (Plaintiff's Exhibit 3) here. It starts in here in a southeasterly direction from a place marked "Springs" in section 31, township 27 south, range (R. 1374) 32 east, south of the lake, and extends in a northeasterly direction. Did you ever see that low area that now has salt grass on it when the water was in there in the early days?

A. Well, that is back in the evaporating pan. I don't really classify the lake as a lake, especially that Malheur side; it is more of an evaporating pan that is indefinite in its rim. Now, that south side where it spreads off down there, I don't remember of seeing any rims along that side. It is just kind of a level lake bed country. (R. 1374.)

I have told about the water coming up to the old Sodhouse Lane, that is the old Meldrum line, west of Springer's Spring. (R. 1375.)

Mr. LILJEQVIST. Q. Let me ask you this: Isn't it a fact that measurements of water in the Silvies and the Blitzen do not necessarily or at all indicate the amount of water that flowed into the lake, except in those two streams alone?

A. Well, I think the lake commences to rise up here at the head of the valley, and with a little current keeps working on down; and down at what is known as the evaporating place is just where it stopped and disappeared. Now, I was greatly surprised when they commenced to taking that evaporation, and found it was so tremendous in this country, and that accounted for so much fluctuation in this lake. As I remember it, it is as much as four feet in a favorable season. (R. 1379.)

Q. In other words, from the knowledge you have had from the country, the dryness of the atmosphere, and the heat of the summer, it will take the water down four feet?

A. Yes, sir; it will take the water down four feet. That information I got from the measurements of the Government when they were taking the evaporation.

Q. And this adjudication of the Silvies River proceeding——

A. It is published and anybody can get it. But I never supposed in the early times that there was any such evaporation as that, or that it cut that much figure, and that makes a great deal of difference with relation to the testimony of all these witnesses, and everybody's observations in not realizing that (R. 1379) there is such a tremendous change.

Q. In other words, the season would have to fill the lake up four feet, otherwise, it would dry up year after year, wouldn't it?

A. Yes. I grew to think that it isn't quite a lake, but just kind of an evaporating pond.

Mr. LILJEQVIST. That is a question of law we are going to settle in this case.

A. Oh, well, you know. It takes a client to make law, so that the other fellow can learn it.

Mr. LILJEQVIST. That is right.

Q. At least this is true, isn't it, Mr. Hanley, that from the time you knew it down in what we call Malheur Lake there was apparently a permanent body of water, wasn't there?

A. Yes, sir. (R. 1380.)

Q. And that is the definition the Land Department, for a hundred years, has given to the lake?

A. Well, they might be wrong. (R. 1380.)

Q. Outside of the last 15 years, Mr. Hanley, did the waters of the spring back up from the lake in Malheur slough to this point, in your judgment?

A. Well, I think several years it has. The rise and fall of that lake and that body of water is so tremendous, and it takes three feet or four feet to make such a lot of difference.

Q. If the lake is 47,000 acres in extent, three feet high would be three times 47,000 acre feet, wouldn't it?

A. Yes; I think so.

And of course, there would be a big lot of that lake that would only have a foot (of water) in it. The reason I say it isn't a lake, but it is more of an evaporating pan, is because it spreads out over this big area and then contracts as the water goes down. (R. 1385.)

Mr. LILJEQVIST. Q. Now, do you know whether there have been a vast amount of shells found all through the bottom of Malheur Lake?

A. Well, I don't know much about that. I was rather under the impression that there wasn't so many shells in there.

Q. Now, I want some more theory in this case. We had some expert evidence about some buffaloes having formed a huddle in the center of that lake, and they tried to get some grass, and there was grass in the mouth of one of them, and so the theory was advanced that the buffalo got in there and starved to death in the center of the lake. Now, from your knowledge, Mr. Hanley, of that lake and the ice and the water and the mud, what is your (R. 1387) theory as to how those buffalo came to die in the center of that (Malheur) lake.

A. Well, there would only be two reasons why the buffalo would go into that lake country, and one would be for water, and (R. 1387) the other would be for food. Since we had cattle in there, and especially these winters I am speaking about, we turned thousands of cattle in there; many thousands of them in there.

There were good strong bulls and steers, I think these heads are buffalo heads all right, but I say we have turned many thousands of cattle in there and the cattle were not weak in the neck either.

Mr. LILJEQVIST. Q. Is there any reason to believe that the buffalo shouldn't have drowned in that lake, just the same as the cattle drowned?

A. They could have, but I would have thought that the buffalo was a little wiser; and he is not so much of a swamp fellow; he is mostly for the hills, and his habits are mostly outside of the lakes.

Q. If he browsed out in the tules, and the sweet grass in the middle of that lake, and he broke through, he was more of a landlubber than your steers?

A. I would be strong of the belief that he was in there looking for water. It would take water to induce him to go in there and not grass.

Q. He might have gone in there when the country around about was dry? (R. 1388.)

A. In the summertime his tendency would be to go farther north; and then in the fall, his tendency would be to go farther south. (R. 1389.)

The cattle did not go in there (Malheur Lake) before it froze up because it was wet.

Mr. LILJEQVIST. Q. In other words, even though the country was freezing up, it was too dangerous for the cattle to go in; wasn't that the fact; and too difficult to get into them?

A. It was just a swampy country, and there was no need of them going in there. There was lots outside better. That was a winter country. The fact that they didn't do it, there were reasons for it, of course.

Q. And the reason was that in summer there was a lot of (R. 1393) grass along the outer edges, and also because they couldn't get at it until it was frozen over?

A. Yes. And that was before the Sand Reef broke through. (R. 1394.)

Mr. MAURICE FITZGERALD, called as a witness for the plaintiff, testified in substance as follows:

The first view of Malheur Lake that I got was in July, 1873, when I first came into Harney Valley with some troops. (R. 1774.)

I think I observed it from what was known as King Bolt Hill, about half way between the OO ranch and Wright's Point; somewhere near half way; it was high—rather a high ridge and from that point we could see Malheur Lake in the distance several miles away. (R. 1776.)

We were not always in sight of the (Malheur) lake; we were traveling away from it to a certain extent, getting farther away all the time, and then you could not see the lake unless you got on an eminence on account of, I presume, the vast extent of the tule marsh (R. 1778) that lay between the water and the dry land, the sagebrush land. (R. 1779.)

In the fall of 1877 (R. 1787) I camped right by Windy Point on the edge of the (Malheur) lake with Mr. D. H. (Rye) Smyth (R. 1788). At that time the lake was pretty well up to the lower edge of the margin; there was a well defined bank on the east

of Malheur Lake, by Windy Point, probably a foot and a half or two feet, it was a low bank, but it was well defined, it was there in former years. The lake came pretty close to that in the fall. (R. 1787.)

Mr. BLACKMAR. Q. Since you have been in this valley what kind of years give you the biggest area in Lake Malheur? Do you understand what I mean? I am asking about what kind of precipitation, what kind of a fall, gives you the greatest area of water in Malheur Lake? (R. 1788.)

A. The spring freshets that went—when the snow is leaving (R. 1788) this portion of the Blue Mountains on the north, and so many creeks are coming into the valley, and the waters are emptied, then a portion of the waters flow into the slough and are carried down, and the Silvies River is well filled with melting snows and waters and is high, and it floods into the lake; and also the Blitzen from the other side; then there is quite a flow of water in the spring of the year.

Q. I understand that, and, of course, the spring of every year you do get some water down there.

A. Some seasons more than others, a good deal; it varies.

Q. What I was directing your attention particularly to was the effect upon Malheur Lake of one of these chinook winds, which brings a thawing of the snow in advance of the thawing out of the ground. (R. 1789.)

Any freshet would have the effect of raising Malheur Lake. That is the only effect I know.

Sometimes we have a thaw in the early spring, sometimes that thaw comes before the frost is out of the ground, sometimes it doesn't; when it does come before the frost is out of the ground it has a tendency undoubtedly to send a great portion of the water into the lake. (R. 1789–1790.)

Mr. BLACKMAR. Q. And then those years when it all comes on gradually, and the ground thaws out, then a large quantity of that water is absorbed in the ground?

A. Oh, yes, certainly that is a fact. (R. 1790.)

Cross-examination:

When I first saw Malheur Lake, it was quite a considerable body of water; open water; towards the east especially. You could see Malheur Lake from the hill around Harney, 15, 16, or maybe 18 miles away.

The hot springs I went to see is not where the Sodhouse afterwards was located, which was on the south side of the lake, but these hot springs are between Saddle Butte and Crane Creek Gap, where the town (of Crane) is now, those are the hot springs we went to visit.

I have looked through the tule country from Wright's Point several times. From the hill you could see open water very plain. At times of the year that (Malheur) lake every year varied a great deal, from the early spring up to the late fall.

I left that country in 1907. (R. 1795.)

Mr. LILJEQVIST. Q. Now, the water in the springtime came back for years and years to that bank on the east side, didn't it?

A. Yes.

The climate prior to the last 25 years varied a good deal. There were some seasons excessively dry, and some probably excessively wet. It seems from the look of the country now that it has been very dry for a number of years. (R. 1796.)

I have been out in the west part of the (Malheur) lake through the tules; when the tules were dry. You could ride horseback through a great portion, in the fall or winter; you could go in the fall season before the winter through a great many tules, many years you could ride horseback through the tules. (R. 1797.)

I never crossed through the lake or water going around that way. I was on dry land most of the time; there were a few places soft, low places or sloughs, or something, where it would be soft, but most of the road was solid.

Once in a while, but not very often, I went into the west part of the (Malheur) lake when the ice was there.

When I first saw that (Malheur) lake, as I say, it was a body of water somewhat the shape of a leg of mutton, the shank at the Narrows, and the rounding part in the southeast, and then the northeast line would be pretty straight. (R. 1799.) It was a large body of water.

Mr. LILJEQVIST. Q. Do you remember the expression: "It looked like a vast inland sea?"

A. I might have said that (in the water adjudication case). It did when I first saw it from King Bolt Hill. It looked like a great stretch of water and I thought it was a big body of water.

In the fall of 1880, and in the spring of 1881, to be correct, I carried mail past Windy Point; from about September, I think to April, or somewheres in there.

The water with reference to Windy Point, in the fall of 1880 was close to the foot of the well-defined bank I told you, and in the spring it was right to the top of that bank.

I was out there a few days ago and the bank is not like it was. I could not find the sagebrush or the greasewood flat. I do not know what has made the difference, but something (R. 1800) has; it is not the same as it was, I know that positively (R. 1801). When I first saw the bank it was defined better; it was most abrupt. Now it is just a gradual break; sort of gradual.

There may have been a great deal of sand blowing around in that eastern part of the lake since the lake has gone down as much as it has now, but there was not much sand blowing in former years that I ever noticed in the eastern part of the lake.

In the early days there certainly were much more grasses growing through the sagebrush than there is now.

Mr. LILJEQVIST. Q. All that country to the east, northeast and southeast of the lake is practically bare of grasses, isn't that true?

A. I think so.

As far as I observed traveling through there, I did not see much grass. (R. 1801.)

There was no well in those days at Windy Point, and I do not remember when the well was put in there.

The road was within probably 100 feet of the Point, at Windy Point, maybe less, close to this end; it was close to this end of Windy Point. As it went south, it goth farther away from Windy Point.

Mr. LILJEQVIST. Q. Now, isn't it a fact when you first knew it, or is it, that (R. 1804) the water came in quite a distance toward the south of Windy Point? Take a look at that map (Plaintiff's Exhibit No. 3) in the southeast quarter where the old Meldrum line is.

A. I traveled horseback and that was the wettest year in (R. 1805) the country, in '81 in the spring, and I went straight from Windy Point to what is known as the well six miles south of the foot of the hill, where the road forks going to Happy Valley and Anderson, and I never had any trouble; there were pools of water in the road along different places, and sometimes it was frozen; but I never had to make a detour, except on the north side of Windy Point at one place. (R. 1805.)

Redirect examination:

The distance I would ride on the mail road from point to point over the road, was called fifty miles. I would ride fifty miles down one day, and fifty miles back the next. (R. 1806.)

Recross-examination:

The distance covered in a day's travel in the army depended on where you would find good camping ground. Sometimes they would not travel more than eighteen (miles), sometimes you would travel thirty (miles), and sometimes even more than that. You had to conform to the conditions that existed in the country you were traveling. (R. 1806.)

Mr. ALPHENA VENATOR, called as a witness for the plaintiff, testified in substance as follows:

Between 1872 and 1878, I was in and about, principally all over, Malheur Lake: all over the north side and around (R. 2316) on the south side some.

During those six years I was clear across from the north side (of Malheur Lake) to the south side (of Malheur Lake) through the present (Lake Malheur) Bird Reserve. (R. 2317.)

Cross-examination:

In 1873, I settled where the Island Ranch stands today (R. 2326), near where the white house stands, down here east of Wright's

Point. There was water in the rivers at that time around Wright's Point, and I saw water in Malheur Lake. (R. 2327.)

I have seen the water (of Malheur Lake) probably a mile and a half from Windy Point; I have seen the water close up to the bank there on the east side of the (Malheur) lake, and I have seen it splash over.

In 1889, I saw them (the settlers) going down the eastern part, almost through the middle of the (Malheur) lake. The next year they could not do it at all.

Mr. LILJEQVIST. Q. And for a great many years after that the only time that you went across there was in the fall and the winter, isn't that correct?

A. The water kept drying up for about six or seven years after that; there wasn't any hard winter; that was the hard winter (R. 2328) of 1890, which was a very severe winter. (R. 2328.)

c. 1880–1890

Mr. LEE MINIS CALDWELL, called as a witness for the plaintiff, testified in substance as follows:

I rode down there (near the lakes) in the spring of 1880, in 1881, and 1882. In 1881 the water was much higher (in Malheur Lake) than it was previous to that. When we would swamp cattle, the water seemed to be about the same all the time. (R. 142–143.)

That part of the lake in which we did the haying was covered with water from time to time when the water receded after the run off. (R. 145–146.)

The difference between the high point of the water at that time and the low point would in some places be a mile or two along there some place, but I could not tell exactly.

We usually hayed down there in the lake at that low place in August. (R. 146.)

The first two or three years I was around Windy Point the water was about the same, sometimes higher than at other times. I never saw the lake over the wagon road that ran around Windy Point at that time. There are two wagon roads there now, but there was only one when I was there. The one road runs right straight through, and if that road had been there at that time (1880–1882), the lake would have been over it at times. (R. 150.) The wagon road that went around Windy Point when I used to travel over it went to Winnemucca. Devine & Todhunter, as well as a lot of other ranchers, used to get most of their supplies from Winnemucca and would come over that road. (R. 151.)

The people up here (where Burns is now) used to get supplies from The Dalles, and also from Susanville, California, before any railroad came by where Ontario is now. (R. 151.)

Cross-examination:

The road on the east side of Malheur Lake that I used to travel went around north of Windy Point and around the sagebrush. It went between Windy Point and the lake, right close to Windy Point, and proceeded to Winnemucca. (R. 152–153.) They hauled mail on that road later as well as supplies. After you go by Windy Point the road turns towards north and east—a little east of north—and bent around towards the point, and then went straight up toward Harney, a little west of north. At that time here was no road between Windy Point and Saddle Butte. (R. 153.) The lake was out quite a little ways from Windy Point. I don't know exactly how far, it has been so long ago. It was a hundred yards or so, if I remember right and distinctly. I was less than half a mile from that road. We did not drive cattle to the lake to water there at that point; we always hauled water for cooking. There was a well at the foot of a hill there called The Wells; there was a corral there where we used to go and make dry camp. There was water right around there within half a mile of Saddle Butte and that was the ordinary normal water in the spring the first two or three years I was there. (R. 154.)

In the spring of the year when it would break up and the waters rushed down there, the waters would rise, and when the high water quit running Malheur Lake would recede. The water rose every season.

There used to be water at the place I referred to around (R. 155) Saddle Butte.

There was no town of Lawen then and I can not say where the water came to with respect to where the town is now. (R. 155.)

I do not know much about the south side of Malheur Lake; I never rode on the south side; I never was there until last winter with Mr. Dodge.

The water rises and falls sufficiently to permit the cutting of grasses and wild hay along the edges of Malheur Lake in the fall between the normal wet season and the dry season. (R. 161.) I do not know whether that hay was cut on the edges of Malheur Lake itself or on the adjoining deeded lands.

I do not know whether there was any water on the Lloyd Culp place in the early days. I might have been there in the early days swamping cattle, but after he located it and the lake went down I never was there but that one time. (R. 162.)

Mr. FRANK WHITING, called as a witness for the plaintiff, testified in substance as follows:

In 1889 or 1890, I worked for Todhunter & Devine or the P. L. S. Co. riding for the Island Ranch. One day I rode up here around Burns in the summer of 1889. We put a lot of cattle in the valley and the water played out; there was no water out on the Silvies River,

but there was plenty of water on the lake. We put cattle in the mountains and drove some down to California. We were late in getting those cattle out of the mountains and I was in the mountains there picking those cattle up in December at which time we had a heavy snow; then we drove the cattle to the lake and put them on the lake because there was no hay. What hay there was had been burned by the settlers. We had a little hay on what was called the head of section 31. I don't recall the township, but it is right by Bill Smith's place and that hay was burned the 22nd of February when we were feeding about 2,200 head of calves at the time. (R. 188.)

The snow was about five or six feet on the summit here. On the 21st of February (1890) we took those calves from the head of the Island and turned them out "below the point," which is between Wright's Point and the Narrows, and then put them out on the lake immediately after that about the last days of February or the first of March. (R. 189.)

At that time I worked all along the north side from what is known as Mud Lake to Saddle Butte. We did not go into Malheur Lake at all, but into the tules as far as they extended out into the lake. (R. 189.)

At that time there was no ice in there where the tules were. It was all gone. As I stated before, it was a very dry season. We had two dry seasons in succession. It was practically dry. In fact, there was a dust when we drove those cattle off those tule beds in Malheur Lake. There were a lot of tules burned that year and the settlers burned out all these tules and let what water there was run through to the lake; they drained off all this land and left it practically dry with the exception of the Silvies River where it empties into Malheur Lake. They had to cut ice for water that winter (1889).

The mouth of the Silvies River on the north side of Malheur Lake has not any fixed point. It spreads out there and goes into the lake through several different channels. (R. 190.) In February (of 1890) the time I have been speaking of, I did not get close enough into the lake to see any open water on this side. From Saddle Butte you can see the open water.

I am familiar with the old cemetery that is near Windy Point. The open water of Malheur Lake was about half a mile from that point. There was a bank there; a very distinct abrupt bank three or four feet in height probably and the water came clear up to that bank. I was down to Malheur Lake off and on (R. 191–192) for ten years steady and continuously. In that time, 1889 was the driest year that I knew of. (R. 191–192.)

I am not as familiar with the south side of Malheur Lake as with the north side. (R. 192.) I was at the Sodhouse Springs in May or June of the year, but I can not give the year. The water at that time was very plainly in sight, and about half to three-quarters of a mile from the mainland. (R. 193.)

Mr. JOHN GARDNER, called as a witness for the plaintiff, testified in substance as follows:

1888 and 1889 was known as a grasshopper year; a dry year. That was the year that I went with Campbell and Haley down to cut hay. They helped Jones up here (R. 273), and I went down and helped them to pay Jones for cutting hay. That year the water was about belly-deep of a cayuse in the channel right at Scott Haley's place. They have a channel that goes to the Narrows and the lake was down pretty low. We got about a hundred tons of hay at the Campbell place, and about the same at the Haley place, and about the same at the Pinto Tom place. That was one of the leanest water years I know of for that time back, that is the season they left the upper island. Of course, it has been drier since then. (R. 274.)

Cross-examination:

The water in Malheur Lake was about the same, or it might have got a little deeper before that Sand Reef was cut, but with the fall of the water, it would go down to about where it generally was. It would go away and go down and evaporate out. All the water that filled up the valley of the Silvies and the Blitzen worked its way down to the lake except that which evaporated away, and until the Sand Reef broke (R. 297) through it had no way to get out except by evaporation. The sloughs and creeks running into the lake used to bring lots of water into it in the last twenty-five years. (R. 297.)

Mr. JEFF D. BILLINGSLEY, called as a witness for the plaintiff, testified in substance as follows:

In July, 1880, when I was getting mail at a mail box back on the road at Windy Point, with some other boys, I saw Malheur Lake for the first time. (R. 381–382.) We did not go down to the margin of the lake, and my observation was not any more than looking across and seeing the water and the tules. At that time, I would estimate the water to be about half a mile from the road at Windy Point. The road ran close along to the base of Windy Point, and the water was about that far away from Windy Point, or the upper road. (R. 382–383.) That road went south to Winnemucca from Windy Point, and north from Windy Point toward Canyon City, and on to The Dalles. It was the only road that I know of in the east end of Harney Valley that you could go south on, or that you could go toward Canyon City.

After 1880, probably two or three times a year, in going to the Island Ranch, or on business to Canyon City, I observed Malheur Lake. Canyon City at that time was the county seat of Grant County, and this end of what is Harney County now was a part of Grant County. (R. 383.) I passed along to and from the Island Ranch over to Whitehorse and we came around the east end of the lake and stopped many times to water our stock or horses out of the

lake at Windy Point, at all seasons of the year. I made many trips, sometimes in the winter, sometimes (R. 384) in the fall, and sometimes in the spring.

I never did see the lake up over the road there at Windy Point. (R. 384.)

Mr. JAMES THOMAS BAKER, called as a witness for the plaintiff, testified in substance as follows:

Between 1885 and 1890, while working for Todhunter & Devine, I handled cattle in and about Malheur Lake. (R. 573–575.). While engaged in swamping cattle out of Malheur Lake, some of them would break through the ice.

Mr. BLACKMAR. Q. What depth did the water appear to be?

A. I wouldn't say. Of course, it would be mud and water, but I couldn't say. Two or three feet of mud, probably, and two or three feet of water where they would break through lots of times.

I have broken through the ice on the lake on horseback, and in getting the animal out it seemed to be mud under the ice; it had that appearance.

While riding for Todhunter & Devine down in Malheur Lake, between 1885 and 1890 (R. 577–578) we had three years that were dry. They were 1887, 1888, and 1889; those were our three dry seasons. The effect that they had upon Malheur Lake was to dry it up mostly. (R. 578.)

It strikes me that there was always a body of water in the east end of Malheur Lake during those dry seasons, 1887, 1888, and 1889; during those years in the eighties, the west part of Malheur Lake was dry. I never rode on the east part of the lake, that was a glare of ice and water, no tules there.

While I was down there, in the eighties, the Malheur Lake country was unfenced. (R. 579.) If there was one, there were ten thousand cattle, that wintered along Malheur Lake border and on the lake; there might have been more; I am just guessing at it, but there were that many anyway.

Todhunter & Devine ran in the neighborhood of twenty-five to thirty thousand head of cattle here at that time—1885 to 1890; those cattle of that concern wintered this side of Malheur Lake and everywhere.

I have been up around the road at Windy Point, and I knew where the well was there, but I could not find it now. The water of Malheur Lake at that time (1885–1890) was about half to three-quarters of a mile from that well. (R. 580.) That was as close as I ever saw the water to that well.

Out there at Windy Point, there is a border, or a bank, half to three-quarters of a mile from Windy Point, and I have never seen the water get away from that border. (R. 581.)

Cross-examination:

I can not tell you how long that water would last (R. 582) when it came up in the spring; I can not tell exactly the difference in the rise and fall between the wet and dry seasons of Malheur Lake.

There were not a great many cattle lost in Malheur Lake in the early days. I do not know of a band of five hundred cattle being lost in one shot there. (R. 582–583.)

Redirect examination:

While handling cattle for Todhunter & Devine (between 1885 and 1890) down there in Malheur Lake, I lost some cattle in there; those cattle were stuck in the mud, and most of them would get their heads under, and before you could attend to them all, some of them would likely drown, by sticking their heads in the mud and water. It is enough to drown them when their heads go under, together with the conditions that existed there at that time. (R. 583–584.)

Recross-examination:

It would not take much water under a cow to drown her, if she had her head down in the mud.

Mr. LILJEQVIST. Q. They ordinarily try to keep their head out of the water, don't they?

A. Yes, but if they are a little bit weak in the back of the head, they can not do it. (R. 584.)

Redirect examination:

Mr. BLACKMAR. Q. From your experience as a cattleman in (R. 585) and about the lakes, in order to drown cattle, have you found it necessary that the water be over their heads?

A. No, sir.

Q. Just tell me how a cow performs when she gets stuck in the mud in the lake with ice around?

A. Well, a cow that is weak, and that gets stuck in the mud, they lose control of their head, you know, and it doesn't take but a little bit of water to drown that cow, if you don't do something to get her out right away. (R. 585.)

The cattle get out quite often, but there are numbers of them that will drown if they have not got help and if they are mired down. In that respect, there is a difference between a horse and a cow. You can hardly drown a horse because he will get out if there is any chance—he has more ambition.

Recross-examination:

Mr. LILJEQVIST. Q. How deep was the deepest water in the lake in the wintertime when they broke through in the ice?

A. That I can't say. Horses would break through, and we would judge maybe it was two or three feet of water and mud with it to make it. (R. 586.)

Mr. GEORGE A. SMYTH, called as a witness for the plaintiff, testified in substance as follows:

I first saw Malheur Lake in June, (R. 670) 1884, at Windy Point, going from the Island Ranch to Happy Valley. At that time the lake was about a mile or a little over from the road there at Windy Point. I had been over that same road for a period of about five years, at the different seasons of the year and every year during that period. (R. 666.)

At the times I passed Windy Point and observed Malheur Lake it changed a good deal. During the period I passed it at Windy Point there wasn't very much difference; it was pretty near the same. I am familiar with the little bank there near Windy Point and I have never seen the lake over that bank at Windy Point. On a good many occasions I have seen it at a considerable distance from that point.

After I went up in Happy Valley from time to time, I came down to Malheur Lake with stock in the spring and in the fall, while working for my grandmother; some of her stock wintered in among the tules. (R. 667.) I did not go into the lake bed very far, just a little ways sometimes; I have never been in there very far. (R. 668.)

When I was in the west end of Malheur Lake around the edge as I sat on my horse I could not see very much open water. (R. 669.) The first time I was in the west end of Malheur Lake was in 1890. I do not think I have been there since. I have never cut any hay in Malheur Lake. (R. 670.)

Cross-examination:

In June, 1884, I saw the water about a mile from Windy Point; that is my best judgment. The first time I saw the water in June, 1884, it was pretty close to that bank there at Windy Point; the next time I saw it was the following year (R. 670) but I do not remember just how far the water was from there, although it was close to it; I was not there in 1889.

Mr. LILJEQVIST. Q. Was it (the water) approximately at that bank most of the time?

A. It probably was in a ways from the bank most of the time. I do not know just how far. Maybe half a mile or so; at times in the spring it was closer.

The water would be about a half a mile west of the bank in the fall of the year.

Mr. LILJEQVIST. Q. And that is about the way it averaged between high and low periods?

A. Yes, somewhere near there.

I do not know the normal rise and fall of the lake. (R. 671.)

I have seen the lake back up into the Springer Ranch. (R. 671.) I do not know how high the water was there in normal seasons of

the year; but it was close up; we had lots of water in those days, and that condition existed after 1895. The last twelve or fourteen years it has been drying up.

In going to Happy Valley I did not go up the Blitzen River but by way of Windy Point. (R. 672.)

I do not know of the effect irrigation in this country has had upon the water supply of the lake.

Mr. LILJEQVIST. Q. There has been a lot more irrigation since you came into the country, has there not?

A. Yes; I do not know whether the lake backed up there in the Nine Mile Slough, but there was a lot of water in it. (R. 672–673.)

Mr. CHARLES R. PETERSON, called as a witness for the plaintiff, testified in substance as follows:

In 1884, 1885, and 1886 I had occasion to go in and around Malheur Lake. I drove a bunch of cattle from Fort Bidwell out here to Stinking Water; we came by Happy Valley, and across the valley there to Windy Point. At a place about half a mile between what they call the Hill place, where the road comes into Harney Valley (and Windy Point) our cattle went to leave the road, they didn't have to go over 150 yards before they hit the water, they watered along the road at that place, and the water was out that far. (R. 675.) There is just a strip of low ground there; it is lower than any other place around there.

Around there at Windy Point there is a low road and a high road. I think we followed the high road and there was no water up to that road when we traveled on it.

I have been by that same place many times since 1884. I do not remember an old mail box that used to stand there at Windy Point on the road. I have passed Windy Point at all seasons of the year. It has been my observation there that the outer edge of Malheur Lake has changed from year to year. There was no well-defined bank, and where there was any low place the water went in. In 1885 I went with the buckarooing outfit to work cattle on the lake; we went just about a mile (R. 676) north of Windy Point where we camped; and the bank was something like this bank here; above the lake, you see, pretty square; (R. 677) and the water was up pretty well, 18 inches or 2 feet, not over that. We were camped probably fifty feet from the lake; that night it rained; the next morning came a blizzard from the southwest; it drove the waves of the water against this bank and put the cook's fire out; it wet all our beds, and the wagon; we had quite a time getting any breakfast on account of the wind; the water was hitting the bank, and slopping over. I never have seen the water over the top of that bank, but I have seen it out a long ways west of that bank. The bank I am talking about is a little northwest of Windy Point. (R. 677.)

Once in the early '80s I went to Malheur Lake in the spring of the year to help swamp cattle. I was on Cole Island. (R. 678.)

Cross-examination:

Mr. LILJEQVIST. Q. Now, let me get this straight with reference to Windy Point and these directions. Now, there are a number of banks involved in this case which the evidence will disclose, and I want to get this straight as to what you are testifying to. Now, there is a bank away out there, a mile from the west of Windy Point. Is that the bank you are talking about when you say it came up there and spoiled your breakfast, or was it a different bank?

A. I think it was a continuation of the bank where we were camped.

I know where the old well used to be at Windy Point. (R. 685.) I could go and find it. With reference to the well we were camped a little west of north, and about a mile or a mile and a half from that well.

Mr. LILJEQVIST. Q. From a mile to a mile and a half north, and a little west of the well is where you camped?

A. Yes. (R. 686.)

There was a bank at that place, and when the wind came up the waves broke and splashed over that bank.

Mr. LILJEQVIST. Q. During times when the wind wasn't blowing in the ordinary seasons of the spring, where was the water of the lake with reference to that place that you have just described?

A. I was there a good many times, and probably it (the water) was within a foot of the top of the bank; sometimes it was down a foot from the top of the bank; the water did get away from the bank, but not during the wet seasons, as I remember.

Mr. LILJEQVIST. Q. And then ordinarily during the wet seasons in your judgment, it got up about how far on the bank?

A. I would say within 18 inches. (R. 687.)

That bank might have been two feet high, something in that neighborhood.

Mr. LILJEQVIST. Q. And that (the bank) was north and a little west, and about a mile or a mile and a half from the well?

A. Yes, sir. (R. 688.)

I did not go over the western part of Malheur Lake very much in the wintertime. (R. 694–695.)

I worked with some cattle one winter on the south side of Malheur Lake on Mrs. Curtis' place. I am not sure but I think it was deeded land. I was there one spring. (R. 695.) I do not know for sure whether the water backed up from the lake in the springtime into those deeded lands of Mrs. Curtis, but I don't think it did very much; that is my opinion of it. I never was there except that one time, and we moved the cattle out early before the high water came. (R. 696.)

Redirect examination:

Mr. BLACKMAR. Q. Now, forget all about distances, and forget all about the map. (Plaintiff's Exhibit 3.) Now, this place up at

Windy Point where you were camped, the little bank that you referred to, is a little thing about 18 inches high?

A. From 18 inches to probably two feet.

Q. And there was no other bank between that and Pelican Island, is that correct?

A. No. sir; there was not. (R. 696.)

Recross-examination:

Mr. LILJEQVIST. Q. Now, if to-day there is in existence a bank about two (R. 696) feet high—18 inches to two feet high, and that bank is approximately a mile westerly of Windy Point, is that the bank where you lost your breakfast, or was it some other bank? (R. 697.)

A. That is where I ate the raw breakfast.

Q. Do you mean to say then that it was a mile to the west of Windy Point?

A. No, it was not a mile, but it was a mile and a half, and a little west, as I understand it.

It was a little north of and pretty close to the old Stauffer corral. (R. 697.)

Mr. GRANT THOMPSON, called as a witness for the plaintiff, testified in substance as follows:

I brought a few cattle into the country with me (in 1885) and the following year, 1886, I brought a few more cattle in; shortly after that, I was riding more or less over the country, and I came in contact with Malheur Lake in riding after those cattle; the haying that I have testified about was in 1887, and I cannot remember exactly when I started riding, but it was shortly after that.

In working with the cattle it has taken me on Malheur Lake, to the east and south sides of it, and the north side principally. I do not know so much about the west (end of Malheur Lake) although I have ridden over that a good deal in the early days.

I have been clear across Malheur Lake on ice many times, and across it when it was dry; there might have been some little prongs there would be water in that I would go around; (R. 701) I cannot tell you what year I was down there when it was dry, but I could come rather close to it, but not be positive. My recollection is that it was very dry about 1890 or 1891, along there. I remember distinctly being out there after cattle, and I know it was quite a ways out before you crossed the bed of Malheur Lake before I came to any water. I entered Malheur Lake on that occasion at a point a little west of what is known as Myrtle Haines' place on the south side of Malheur Lake; and there was a ridge there. (R. 702.)

(NOTE.—The Myrtle Haines' place is Myrtle Caldwell's place, but not where she is living now. R. J. Haines was Myrtle Caldwell's former husband. That place is in the southwest corner of Lot 3, Section 17, T. 26 S., R. 33 E., out near but west of Windy Point.

There is a stone house and sort of a pit on the place.—Pecore.—Grant Thompson (R. 702–703).

I found some cattle on this water in the vicinity of the Haines place.

It is my recollection that at that time there was a slight bank there that the water came up reasonably close to and the cattle were watering there; it was quite muddy around the lake and mired down, but this place where the water was was fairly reasonably close to the shore, and my recollection is there was a slight bank there.

Mr. BLACKMAR. Q. I thought that this was a very dry year that you were (R. 703) talking about?

A. Well, there were two years in succession that it was quite dry.

Q. What I am trying to get at, was that occasion that you crossed the lake when the bed was dry?

A. It was since I have crossed the lake when it was that way.

Q. But not on that particular occasion?

A. No, not at that time.

I cannot tell you the first year that I crossed (R. 704) Malheur Lake when it was dry, but I have crossed it. That is all I know. My memory is very poor about dates.

I have crossed Malheur Lake when it was dry prior to 1895; in 1926 I think it was practically dry. I have been all over the bed of the lake.

Mr. BLACKMAR. Q. I meant in 1895?

A. No, I could not say that I have. The lake used to be very miry and you could not get near the water without taking chances of miring down except only in a few places. The place would be miry for miles at Mud Flat.

Q. Where is Mud Flat that you refer to now?

A. Any place where the water would recede; as fast as the water would recede, or where the ground had been wet, it would be very miry at times and heavy winds would spread the water out and it might cover it to-day, and in a day or two, it would recede (R. 704) and go back again, and in that way it kept soaked up so that it was difficult to get across it at times. (R. 705.)

The stage of water in Malheur Lake changes from year to year; it is usually dependent upon the precipitation.

Mr. BLACKMAR. Q. The recession of the water—the farthest point it goes out every year changes from year to year?

A. Yes, sir; it varies.

Q. Do you think in some places along that lake, in some years there is a variance there of several miles?

A. It seems to me there is. I think I have noticed that.

From time to time I have been in the west section of (R. 707) Malheur Lake with cattle; during my experiences with cattle, I have seen a good many there in the wintertime, belonging to myself and everybody; the purpose of the cattle going in there is to feed

during the winter; they feed all through the tule patches on the lake. (R. 707.)

Mr. BLACKMAR. Q. And around those tules, I understand underneath there is some hay or grass?

A. Well, when you get well out along the edge you might find that condition.

Q. Here is what I am trying to get at: What is it that attracts the cattle in there?

A. Well, they will browse a great deal on these tules on the tops of which there is seed, and they work on those. Even though the tops of the tules may be dead, down near the water they are green, and they work on those. (R. 708.)

Cross-examination:

As near as I can remember, the dry years were 1890 and 1891, but I could not be positive. (R. 714–715.)

I have heard them (the witnesses) speak about two different years that there was no water, and it was along about that time that there was no water from the Silvies River reaching the lake, and in fact, it never got down farther than Cattersons or the east line of the (P. L. S.) Company's holdings two years in succession; that was around 1890 according to my best judgment. I say extremely dry year; I know that the water was much lower in the lake. The way that I came to remember that so (R. 715) distinctly, there was a big band of cattle that was being driven from the John Day country to be delivered some place in Nevada, or Winnemucca I think. (R. 715.) I remember that they lost a lot of cattle through the country here as they went through, and I found some of the cattle that day; took them home and I think there are different parties in this room who would remember that time. Do you remember it?

A VOICE. I remember; 1889.

A VOICE. 1888–1889 were the dry years.

Mr. LILJEQVIST. Q. At any rate, it was a dry year? Whatever the evidence shows were the dry years, it was that time?

A. Yes, sir.

And that was the time I found the water right in the vicinity of the Myrtle Haines place; she was not there at the time, but I remember that it was in that vicinity.

At the time I was living on Crane Creek, and I had to go out by Windy Point to get out, and I went near Windy Point; and the water would be quite a ways out from Windy Point at the time. (R. 716.) The water's edge would be anyway three or four miles out from Windy Point according to my best judgment. (R. 717.)

Mr. LILJEQVIST. Q. All right, now, when you testified that there was a variance of several miles, did you mean that in the ordinary season, or was that between this extremely dry season you know of, or the recently extreme dry years? Just what do you mean by that answer? (Question repeated at request of witness.) (R. 719.)

A. Well, the stage of water varies a great deal. That is my experience. (R. 719.)

It is hard to tell how much the water rises, or falls, during evaporation, but it varies materially. (R. 719–720.)

Mr. LILJEQVIST. Q. Is it your experience that it evaporates more rapidly where tules grow?

A. No; I would not think so.

Q. You would not think so?

A. No.

When I came here in the early days, there was a great deal of water for a good many years.

There was more precipitation then than we have had in late years.

Mr. LILJEQVIST. Q. When do you figure that it began to dry up consistently?

A. It varied on account of the seasons. Some seasons were much earlier than others.

Q. I do not mean in each year. I mean when the real cycle of dry years commenced, when it began to get drier and drier.

A. It seems to me the last ten or fifteen years, and I don't know but what it was even earlier than that.

Q. There has been a great deal of water used for irrigation during the past twenty or thirty years, has there not?

A. Yes.

Q. And as the water has gotten shorter, they have dammed it up and kept it up on the lands longer, haven't they?

A. Well, I think as a rule they keep it as long as they can. (R. 720.)

Q. As a matter of fact, they keep it until it evaporates?

A. That was the way we used to do in the Lawen country. We put in dams.

Q. Is not it a fact, year after year in the last ten or fifteen years, that no water has gotten into the lake at all from the Silvies River?

A. No, I think about three years ago, but I wouldn't be positive, but it has only been a short time since the water has gone into the lake from the Silvies; I think it is about three years.

Q. As a matter of fact, for a great many years comparatively little water has gotten into the lake from the Silvies, as compared to the early days when you first knew it?

A. As far as that is concerned, there is no comparison of late years with reference to the water that reached the lake, as what formerly did when we had lots of rain and snow in the mountains.

I can not tell you the acreage put under irrigation in the Blitzen Valley. (R. 721.) I think some sixty thousand acres were in the district, although I can not remember the exact number. They aimed to get as much water as they could on the land and they raised alfalfa up the river here.

Mr. LILJEQVIST. Q. Now, as a matter of fact, in the ordinary seasons of normal high water before the recent years, water came

up to the Neal meander line, didn't it? (Question repeated at request of witness.) (R. 722.)

A. Yes, sir.

Q. Now, these various places of individuals that you referred to, isn't it a fact in the early days that many and many a season it was so wet they could not cut any hay at all when the dry part of the year came on?

A. Yes, I think so. (R. 722.)

Q. Isn't it a fact, Mr. Thompson, from your knowledge of the country that a great portion of the deeded lands—by that I am referring to the lands that were obtained from the United States Government—secure their right to raise hay crops by reason of the backing up of the water of the lake on to the lands in the spring?

A. No, sir.

Q. That is not true?

A. Well, it might be in a measure, but then the water has to go over these lands, through these sloughs, before it reaches the lake bed, and it would necessarily have to reach the lake bed before there was any back water from the lake to benefit any of these lands.

Q. If it did reach the lake bed, the lake bed filled up?

A. That is the only thing that would make it back up.

Q. I know. And that is what it did, didn't it?

A. To some extent, yes.

Q. As a matter of fact, there were a great many of the patented lands around this lake that are only irrigated by the back water of the lake when it is filling up, as distinguished from the overflow of the Blitzen and the Silvies, isn't that correct? (R. 723.)

A. No, sir; I don't think so.

Q. You don't think so?

A. There might be a little on the west side down in the Graves settlement in there; but on the north side, I don't think there is any of the patented lands but what can be watered through the natural channels if the water was allowed to run.

Q. That is, the natural channel of the Silvies River?

A. Yes, the natural channel of the Silvies River.

Q. There are channels and sloughs that lead out from the Red "S" Field from Silvies; is that what you mean?

A. Yes, and after you get beyond the Red "S" Field, down in the Lawen settlement there are still sloughs.

Q. Did you ever see water back up from the lake in the Lawen region?

A. I can say I have seen that district when practically all the Lawen country was under water, but the water was moving. It might have been held back to some extent by the waters in the lake, but it wasn't still; it was moving.

Q. A great portion of the water of the Silvies River was caused to come to a dead stop by the backing up of the water of the lake until the lake water and the river water merged; is that not so?

A. I couldn't say as to that. I have seen water in the sloughs in that Lawen country so that we couldn't hay; there would be waters on that land so that we couldn't cut the hay. (R. 724.)

Q. I am trying to see if you are claiming in this case that the water in this lake did or did not back up close to Lawen for many, many years in the springtime?

A. I couldn't say that it did back up, but I have seen water there, but the water was always moving. It was not standing there sluggish and still. It might have been to some extent checked by the waters in the lake, which probably was quite likely.

Q. Do I understand you to testify in this case that the vast amount of irrigation that has gone on in the Silvies River has not had any appreciable effect upon Malheur Lake?

A. Why, of course, it would have some effect upon it.

Q. And it would have a great effect upon it, wouldn't it?

A. You might say that it would; but this water has been spread out for years over these lands, and, of course, there is a lot of it that would never reach the lake.

I own land down on the meander line at the present time, but I can not give you the section or township, but I can show you there on the map (Plaintiff's Exhibit No. 3). (NOTE.—Mr. Pecore: His place is lots 4, 5, and 6, of section 22, T. 25 S., R. 32½ E., shown on Plaintiff's Exhibit No. 3. R. 725.)

Mr. LILJEQVIST. Q. Did the water come up on normal stages on the rise of the lake to that (Neal) meander line in front of your property?

A. The first year that I bought that place was in 1917 and I couldn't go down to the meander line on the lake. It was too wet. I have owned the property since 1917. (R. 726.) Mr. Ausmus is below a part of my holdings and he has hayed from time to time, and I have seen the water there.

Mr. LILJEQVIST. Q. Have you been claiming riparian rights for your land?

A. Yes, sir.

Q. Of course you know there are no riparian rights unless the lake came to that meander line of Neal's, don't you?

A. I am not familiar with it.

Q. But you have been claiming riparian rights?

A. Yes; but I want to tell you now, when I told you that I didn't, or that I couldn't cut to the meander line in the year I bought it, it has been done since.

Q. And there have been some years since 1917 you couldn't cut also?

A. Yes, sir.

Q. In other words, in 1917 it was too wet to get down to the meander line?

A. Yes. (R. 726.)

Q. And even a number of years since?

A. Not a number, but several.

Q. There have been several since 1921, isn't that a fact?

A. There have been years since that, but I don't remember how many. (R. 727.)

Mr. CAMPBELL C. KILBURN, called as a witness for the plaintiff, testified in substance as follows:

When I first came to Harney Valley in 1882 I immediately commenced working for the Pacific Livestock Company with cattle. My work took me around Malheur Lake in the spring, in the fall, sometimes during summer months, and even during the very early spring, because we had to get the cattle out of there. During the summer months we were on the lake more or less. In handling the cattle down there at Malheur Lake we covered practically the whole lake during the period of my experience there. (R. 728–729.) I have been over all of the west end of Malheur Lake that it was possible to go over in those days with a horse.

In those days all of the cattle in Harney Valley wintered around that lake on all sides, north, south, east, and west; they wintered all through the tules and even on the islands. In those days I believe there were thirty to forty thousand head of cattle that wintered right there in the lake bed west of the line drawn north and south from the mouth of the Silvies River. (R. 730–731.) The cattle that were taken in there to winter had previously been in the sagebrush in the valley. They did not run on the lake in the summertime.

In those days we did not have any hay put up to feed the cattle; they wintered out. They bought a little hay for the horses only, and the cattle lived on the grass or on the tules in the wintertime. They wintered there. In the springtime (R. 731) some of the cattle were pretty thin; others were in fairly good condition; some of them were very fine. (R. 731.)

Cross-examination:

I was in there (Malheur Lake) in 1882, we were working cattle, we would camp down by the Sand Reef possibly two nights; we worked to the boundaries of the lake; there was more water there than there is now. (R. 737.) I did not work there in the spring; we gathered beef that fall, the first time we worked the cattle. In the fall was the first time I was ever at Malheur Lake. Then I went away and came back in 1887.

I do not remember with certainty the conditions of the water at Malheur Lake in 1888, which was a dry year, or in 1889, which was very dry, but in different places it was closer to the shore; there were places where I believe the water was back a couple of miles, at other places not so far.

The winter of 1889–1890 was a very hard winter. We had lots of snow, and as I remember that filled up Malheur Lake pretty well that year. (R. 738.) From that time on, in the springtime and in the summer I never saw the water nearer than a mile to the

old town of Lawen, and that wasn't the water of Malheur Lake, it was flood water from the rivers and snows. I never did see the water of Malheur Lake back up to there.

In the spring of the year I went east towards Saddle Butte, we swamped (the cattle) in the lake everywhere around there. I don't think that I ever saw the water closer to Saddle Butte than a half to three-quarters of a mile, at any time, although I (R. 739) may be wrong there. I think that that was the usual condition in high water. (R. 739.)

There is an old bank along there near Windy Point where the high waters have blown the waves up and made quite a bank there, and in the average year it was about one hundred yards from that bank to the water, but that was a long time ago. I remember the old Stauffer corral out in that vicinity, I would not be positive but I believe it stood between Saddle Butte and Windy Point, nearer Windy Point than Saddle Butte. I do not think that the water ever got near that corral; it might have.

I believe there was possibly forty thousand head of cattle that went into the tules in the winter time, not on the ice and not in the spring, for feed in the western half of Malheur Lake. They did not go out on the lake bed. I went in that tule country to the place where I told you of seeing a large house on account of the mirage; we went through mud and mire there. At that time the traveling of course would seem farther than it possibly was. It seemed we went through three or four miles in the mud and tules, and it was very warm weather when we went in there with the cattle. We didn't go in when we had ice to bring them off on. It was very warm in there and the tules were much higher than your head on a horse, and they were dense. I think that was in July, although I would not be positive. (R. 740–741.)

Mr. LILJEQVIST. Q. Did you ever go up on a hill and look down through that (R. 741) tule area?

A. To see the waters of the lake you would have to get back on the high ground.

Q. When you got back on the high ground and looked out at it, how did it look?

A. There was a lake out there. (R. 742.)

The cattle did not go into Malheur Lake until it froze up, because prior to that it was boggy in there, there was mud and water and slush there. (R. 742.)

I do not know how much mud there would be down to hardpan; some places a long ways I think.

I do not know whether any cattle got drowned or not in Malheur Lake, that is not for me to say; we tried to get them out before they did drown; they would bog down; we pulled them out with a saddle horse and helped them up. Lots of them died, but others did not. On the north side of Malheur Lake as the water receded down in the spring there were acres and acres of grasses or tules or

swampy vegetation that were cut, on the part of the lake that had been covered with water; and in width it would be in some places four or five miles; that is in the Pacific Live Stock Company's field. (R. 746–747.) I could not tell you how much was cut down in Malheur Lake itself. (R. 747.)

Mr. LOUIS WOLDENBURG, called as a witness for the plaintiff, testified in substance as as follows:

When I came into Harney Valley for the first time, November 5, 1884, I came on horseback around Windy Point. I have been back there to Windy Point several times since then. There was only one road there at that time that went right by, or pretty close to Windy Point. My recollection is that I could see a small bank there, and the water was perhaps half to three-quarters of a mile away from that bank, or before there was any water. (R. 747.)

I came down through the west end of Malheur Lake in 1889, and I have been down there several times since. I know where there is a channel that runs through the west end of Malheur Lake (towards the Narrows). (R. 753.)

Cross-examination:

On November 5, 1884 (R. 755) when I first saw Malheur Lake, I was riding alongside of it on horseback, along by Windy Point. At that time there was a bank (near) there and the water was about half to three-quarters of a mile from that bank. I just traveled along that road. (R. 753.) The bank that I am talking about I think is about a foot to two feet high and about a mile west of Windy Point, although I cannot say how far it was from Windy Point to the banks of the lake. It might have been a mile. The road is quite a (R. 754) ways from Windy Point. The water was about a mile and a half from Windy Point. (R. 754.) I have not been out there since to check up on the ground. I was through there next to Windy Point several times after that, but I have never been out to the bank. I have never seen water that came up to that bank. I have been through there in a rig in the summertime, and I have been through there in a car, but I paid no attention to the water. I was not down there in 1889 (R. 755); 1889 was a dry year; the heavy winter came in 1890. In 1891 I took up my place (homestead) right near the Adam George place; I think that was inside of the meander line of 1877; and that was before Mr. Neal ran the second meander line. In the springtime the water was nearly all over my place except in some high places where there was no water, but I should judge it was half under water. I think the water was the overflow from the Silvies River. I do not know that the Silvies River ever quit running into the lake. (R. 756.) The Silvies River was nearly full all the time that I was down there that season, and the water was going into the lake. That was in 1891. I was not there for a number of years afterwards. I disposed of that place and I have never been there since.

I observed conditions while I was in that country. I left soon after I got here and did not come back until (R. 757) 1889, and I (R. 757) observed the conditions from 1891, off and on until 1900. Off and on I was down there on Malheur Lake during that period but not at my old place. I was on the east side of Malheur Lake. The one year that I was down there, the Silvies River flowed into the lake. I do not know whether the water backed up from Malheur Lake or not, or whether it was the overflow from the Silvies River, but there was a lot of water there, and it receded when the season was over; finally there was hardly any water on my place, but there was water in the channel of the river all the time that I was there in 1891. It is pretty hard for me to say whether that water was the overflow from the Silvies or whether the lake had backed up and stopped the channels. At my place the channel of the (Silvies) river was entirely exhausted; there was not any more channel. The river spread all over. (R. 758.) It is my judgment that the overflow of the water all came from the (Silvies) river and its tributaries in that vicinity. (R. 759.)

Mr. CLARENCE THOMAS CAREY, called as a witness for the plaintiff, testified in substance as follows:

In 1884 when I first saw Malheur Lake, I was a small boy riding the range for cattle and horses and my work on the range took me from time to time during the winter months into Malheur Lake.

Mr. BLACKMAR. Q. Did you hear Mr. Kilburn testify this morning with (R. 760) reference to cattle in there in the winter?

A. Yes, sir.

Q. Is that substantially your recollection of the situation?

A. Well, I couldn't make any statement as to the number of cattle in there. I know there was a lot of cattle in there.

Q. I am just referring to the condition with reference to cattle going in there to feed on the islands, and on the flag grass, and the grass around the tules.

A. Yes.

I have pastured cattle in the fall and winter months down there on Malheur Lake, but not in the summer months. I have taken cattle in there prior to the coming of the ice. (R. 761.)

Mr. CARLTON EMERY PARKER, called as a witness for the plaintiff, testified in substance as follows:

My work in riding for Harden & Riley (which started in 1888) (R. 774) did not take me to Malheur Lake a great deal, but once or twice a year we would go down there around the lake. I have never been in there when they were swamping cattle. We would ride in the west end of Malheur Lake mostly, in the fall, before the ice came, gathering cattle. We did not do much in there when there was much water in that part of the lake.

Mr. BLACKMAR. Q. Well, from time to time in this country, has

it been possible to pasture cattle in certain parts of Malheur Lake in the fall of the year when the water is low?

A. Yes, sir; I believe that is the case.

Q. And these cattle that you speak of were in there on pasture, and in the fall you and the rest of the men would go in there and get them out?

A. Yes, sir. (R. 775.)

I do not remember getting any of the cattle out of the tules; some would be around the edge. Later that country in there was more or less fenced. I rode in there mostly in the nineties. I have never cut hay out in the lake bed; I have seen hay cut, and hay that has been cut out in there; I have seen the hay in stacks.

Mr. BLACKMAR. Q. As a matter of fact, nearly every year they have been able to cut hay down in this lake bed and stack it, haven't they?

A. That has been so most of the time; yes, sir. (R. 776.)

It is not unusual to cut hay down there in the lake bed.

I have been around these lakes in the last few years. I have been down there since the Government has put out the markers to show the Bird Reserve. (R. 776–777.)

I could not say whether in the nineties when I was riding down there that I have seen the ranchers cut hay below those markers; I have not been on the side so much where they have those markers; it was more on the other side of the lake. I am not as familiar with this side of the lake where they cut the hay where the markers are. I have not seen them cut hay below the markers on the other side so much. I don't know much about it.

I am familiar with Haley's place. Haley cut hay in there, and in the fall he had cattle up around his place when I was in there. I may have known where Red Campbell's place was at that time, but I have forgotten it now. (R. 777.) I think I know Red Campbell when I see him, but I can not tell you where his residence is. (R. 778.)

(No cross-examination.)

Mr. ROBERT J. MCKINNON, called as a witness for the plaintiff, testified in substance as follows:

My freighting operations covered about twelve or thirteen years, and during that period, I had to use the road along by Windy Point; I passed there and camped there a good many times in all seasons of the year. In June I have seen the water right close to the road there. I suppose there was an old mail box there at Windy Point but I don't remember it. The water of the lake that I saw there spread out there into the sagebrush. (R. 811.) The water was right close to the road, I suppose quarter of a mile away from it, may be some of it closer than that.

I am not familiar with the formation of the ground out there at Windy Point, nor with the little bank there, because I was never that close to the lake to be able to say.

I went over that road quite often and I don't remember that it was not always in such condition that I could get over it with my teams. I always went through all right; in some places it was a little soft, though.

Malheur Slough is north of there; where it was soft is what we called the Nine Mile Slough; I have come through there lots of times and got mired down through that country, and I had to wade out.

I passed Windy Point when the lake was considerably farther out; quite a ways; don't know just how far, and you (R. 812) could see the (R. 812) water all right but I would not say how many miles it was; quite a little ways out anyway.

Mr. Blackmar. Q. Several miles?

A. Yes; I think so. (R. 813.)

I have seen the water close up to Lawen; I suppose about a hundred yards; may have been a little farther, but it was right close, anyway.

With reference to the low-water point, I have been about five miles south of there, Lawen, that is about as far south as I have been, and I did not see any water then to speak of; there might have been a little in the sloughs; I don't remember what year that was. (R. 814.)

Cross-examination:

The year that I saw the water away from Windy Point was not the dry year of 1889, but it was somewhere around 1893 or 1894, cannot say exactly which year. It was not a dry year, there was water pretty much all over. I cannot remember the year that I saw the water backed two or three miles westerly from Windy Point. (R. 815.) I think there were drier seasons than that. I have seen the water on the east side of Malheur Lake back there a good many times; I drove a stage down there steadily for about four months in 1886 or 1887, to Fort Bidwell.

Mr. Liljequist. Q. And most of that time, or during that time in the spring and the summer, the water was right near the bank at Windy Point.

A. Well, I never noticed the water there. I guess there was some water though, right there. (R. 816.) I have not been down into Malheur Lake swamping cattle. I went down there to gather some cattle one fall, on the ice, and I did not go to the edge of the lake, but in the tules to drive the cattle out. I did not go down to the lake at all. (R. 816.)

I have never been in the western end of Malheur Lake. (R. 817.)

Mr. William J. Dunn, called as a witness for the plaintiff, testified in substance as follows:

I have lived continuously on Malheur Lake since 1885. I have engaged in swamping cattle out of the lake down there.

When I first came down to Malheur Lake, there were no other settlers out in the lake. We were the first settlers in there; that was in 1885. Three to five years later, Scott Haley settled in there, and Red Campbell also settled in there about the same time as Haley. (R. 818–819.) I also knew that Jason Bennett was in there (Malheur Lake).

As near as I can remember, all of those men had houses on their places.

I don't remember Z. L. Thomas, but he might have been in there. I don't remember George Thompson, although he may have been there too. I don't remember Charles Riley, or Ed. Taylor. (R. 819.) They could have had their houses in there (Malheur Lake) all right; there are a lot of people who came in there that I didn't know; I knew Haley and Campbell and there were quite a lot of people in there.

Mr. BLACKMAR. Q. Do you know whether or not those people would stay out there the year round?

A. Yes. They stayed in there, and hayed in there. They raised hay, most of them. (R. 820.)

Q. There has been hay cut in the lake below the meander line in nearly every season, hasn't there?

A. Yes.

Q. At some place in the lake?

A. Yes.

Q. And, of course, in the dry years, you get more hay down there than you do in the wet years, don't you?

A. Yes; we do.

Q. Since 1885, down to present date, can you remember a year when there were not haystacks down there in the lake?

A. Well, now, we came in there in 1885, and it was 1888 before anyone moved in there.

Q. From 1888 down to the present date, have there been any haystacks there?

A. Yes.

Q. And there have been people living down there? (R. 820.)

A. Yes.

I can recall the dry year of 1889 or 1890. It made the lake lower and some parts of it were pretty dry. (R. 821.)

The water which we get every year on our place down there (in the center of section 34, T. 26 S., R. 31 E., south of the lake) on the south side of Malheur Lake comes from the Blitzen River. The last few years we have not had any water though; this year we have not had any; it has been a very slim year; we had some water this year.

The land at the mouth of the Blitzen River, and then my other land on the river in section 15 is overflowed from the Blitzen every year; all of it is overflowed from the river. (R. 821.)

Mr. BLACKMAR. Q. As you have seen this lake in there since 1885, would you say that the size of the lake changes from year to year?

A. Well, I believe it is not as big as it used to be. (R. 821.)

Q. What I am trying to get at, Mr. Dunn, does the size of the lake change according to the amount of flow you get down there from the river?

A. Well, of course, if we don't get much water, it naturally won't spread out as much. Is that what you mean? (R. 822.)

Q. What I am talking about is this: What I want to know is if the size of the lake remains the same every year?

A. I can not say but what it does—about.

Q. What do you mean by the size now?

A. Well, a long time ago, when there was more water, of course, it was out more. Now, of course, we don't get so much water and it won't be out so much.

In June of each year, the water might be a little lower down, not in the same place; when there used to be a lot of water, it would be out farther. When we had lots of snow in the mountains and considerable rain, the lake would get larger and we would have a bigger lake surface; when the fall of snow is light, then the lake goes down; it naturally would not be so big. (R. 823.) After the high water goes down, the lake recedes every year.

Mr. BLACKMAR. Q. Now, what I want to know is the distance that it comes up every year—whether that is the same every year, or does it change? (R. 824.)

A. It changes. Some years it doesn't come up so far.

Some years it goes down farther than it does in other years. (R. 824.)

There is lots of water on the Caldwell homestead. The Blitzen, it seems to me, moved the water that way, and then another part went to the Sodhouse Spring and divided up there about the middle. (R. 826.)

I have driven cattle on to the bed of Malheur Lake and fed them and pastured them there in the fall of the year after the water has receded and before the ice comes; other ranchers have done the same thing.

I have lost cattle in there by having them mired down; and I lost some this year, and my brother lost some about a week ago, he told me; and he lost them just north of where Ted Dunn lost his.

Mr. BLACKMAR. Q. Was that the place where we saw the geese the other day?

Mr. PECORE. I think so; yes, sir.

The WITNESS. It might be a little east of north. (R. 828.)

These cattle sometimes get stuck in the mud, fall over and drown in shallow water. A cow will go into the water and she will be dry when she goes in, but she drinks a lot of water and tries to get out, but if she is a poor cow, she can't get out; she won't go very far. So that cattle have drowned in the water when it was a foot or less deep; it could be (R. 829) less than that if they got their head down. (R. 829.)

Cross-examination:

I own land on the south side of Malheur Lake. The Blitzen River runs northerly into the lake, and as it goes down in the vicinity of Springer's (Sodhouse) Spring, it is diverted and has been for many years over the patented lands. (R. 834.)

My patented land has got a lot of irrigation by the overflow of the Blitzen for many years past.

Mr. LILJEQVIST. Q. And that river (Blitzen River), and the Silvies River flowing into it causes the lake to fill up?

A. The Silvies River would; yes.

Q. Well, you know where the lake backed up in front of your lands, don't you?

A. Yes.

Q. Where did it back up in front of your lands? In reference to the Neal meander line in the normal springtime?

A. Well, it comes up sometimes, I imagine, near the new meander line.

The water does not go beyond that line much; it might a little at times. Where the water of the lake goes to in the ordinary seasons of high water with reference to the Neal meander line depends a good deal on how much water there is in the lake.

Mr. LILJEQVIST. Q. I am talking about the early days, and not the late days.

A. I think that is about right. (R. 835.)

Q. Yes. In 1895 would you judge that was about right (R. 836), the way the water was in those years?

A. I think so. It might be. (R. 835–836.)

My mother, Martha Dunn, is now dead; I don't recollect much about you (Mr. Liljeqvist) interviewing my mother in 1919. The old place that my mother had is located at a point north of the present house, the new house where Ted Dunn lives; she lived north of that place down at the point where there is a spring there; in 1919 she lived in that big white house.

(NOTE.—The old Dunn house, as near as I am able to find out, was on Lot 11, Section 31, T. 26 S., R. 32 E; and the Ted Dunn house is in Lot 2 of the same section, township, and range.—Pecore. R. 837–838.)

Mr. LILJEQVIST. Q. Now, your mother then in the early days lived in a house at the foot of a hill down near where the spring is, is that correct?

A. She bought a house there. She bought that house in the first place from a man by the name of Hayes.

I did not live there much; at times I was there in the spring.

Mr. LILJEQVIST. Q. What is the fact about your mother being compelled to move that house (the old house at the foot of the hill where she lived) out on account of the waters in the springtime coming up to that house, and she having water on the floor of the house, and having to move it back, and did move it back. What do you remember about that? (R. 838.)

A. I don't remember any water on the floor of the house.

I don't know anything about that personally. (R. 838.) I remember the old house was there and there was a spring there; the house was set above the spring the way I recollect it. I don't recollect of any water ever going on the floor of the house.

I don't know where the meander line is out north of that spring, but I know where the spring is.

Mr. LILJEQVIST. Q. And according to this map which has been offered in evidence, Plaintiff's Exhibit No. 3, it is approximately 10 chains, 660 feet from that spring on the meander line of Neal's. You know where the spring is, do you?

A. Yes.

Q. And about 660 feet north of that spring—that is the meander line offered in evidence.

A. Yes.

Q. I want you to tell me whether the water of the (Malheur) lake at normal stages of high water backed up to that place in the (R. 839) vicinity of the place where your mother lived?

A. Well, it has been up there, but normally I don't know.

Q. You don't know?

A. I couldn't say as to that. (R. 840.)

Redirect examination:

My mother's house, the old house, was not more than about twenty feet from the Dunn spring. (NOTE.—The elevation of the Dunn spring is shown (on Plaintiff's Exhibit No. 3) to be between 4,093 and 4,094 feet; some of it a little above and some of it a little below.—Pecore. R. 841.)

Mr. WALTER B. PARKER, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

About two months after the Sand Reef broke (May 2, 1881) (R. 873) I was around Windy Point.

I stayed in this county about 30 years.

Mr. LILJEQVIST. Q. Now, let us get a time subsequent to when this Sand (R. 877) Reef had any effect on the (Malheur) lake. A number of years afterward were you around Windy Point?

A. Yes, sir. I was there different times around Windy Point.

Q. How many years did it take for the water (of Malheur Lake) to run down and level up with Harney Lake?

A. It took about a month or two, I should say.

Q. If some witnesses say it took a couple of years to empty the lake out, would you think they were wrong in their conclusions?

A. I would think so.

Q. In your judgment, after a month or two, the Sand Reef wouldn't have any effect upon the (Malheur) lake?

A. No.

Q. After that time, in those subsequent years, where did you see the water at ordinary high-water times around Windy Point?

A. I did not remember what years, but I saw it there, I think, in July of 1881.

That was shortly after the Sand Reef broke through. I saw it again in later years, but I don't know what years they were. (R. 878.)

I have seen Malheur Lake with reference to Windy Point, when the water probably was a half a mile out from the old lake bed; and I have seen it when it was probably three miles out. I don't know exactly about the distance, but something like that.

I do not think I was there in 1889, and I do not know the normal spread of the water between the high and low water marks around Windy Point. I have seen the Stauffer corral, but I could not locate it exactly. It used to be east of the lake, but I really can not say just where. I have never seen the water around the corral. In the early days it was pretty close to the lake, but there was no water around the corral. I mean the corral was not very far from the lake in the early days. (R. 879.)

Mr. JOHN L. HEMBREE, called as a witness for the plaintiff, testified in substance as follows:

In the west end of Malheur Lake (R. 887), and east of the Narrows, or toward the Sodhouse district, there were a good many families living in there, and each one of them cut hay for their winter's feed. There was a man there for a few years by the name of John Harper; there was Taylor and Bert Simmons; Bert Simmons had a concession in there or an interest; and there was Mrs. Simmons, the mother of the Simmons boys; and there was Cass Hayes and Jim Caldwell and Billy Dunn; and Frank Dunn was up in that neighborhood; Springer was just a little beyond the Sodhouse district. Those people were interested in that land that was within the Neal meander line. As I understand it, the meander line was surveyed up to the Sodhouse district—to the Sodhouse Springs, in the neighborhood of where the Blitzen (R. 888) River comes in. I knew Mrs. Dunn and her family quite well; in the early days before 1895 we used to go up quite often in that territory in the vicinity of the house where Mrs. Dunn lived; we visited there, but I can not recall as to exactly what time we went there.

Mr. BLACKMAR. Q. Well, now, these people that you have mentioned who lived within the (Neal) meander line (of 1895), they lived in their houses there with their families, and they had the usual farming implements there, is that right?

A. Yes; what they required to handle their ranches with, you see. (R. 889.)

Most of the crops that they raised were hay; some of them had small gardens there for household purposes. In going from our place (at the Narrows) to the homes of Mrs. Dunn or Mr. Harper, or to the homes of some of those other people I have mentioned (R. 889) we always went with our old-time conveyances, either by horseback, or by driving; principally it was by horseback in those days; in going there we could always reach the high lands; we were

not required to go into the border of the lake, or the water. I am speaking now of Mrs. (Billy) Dunn and where they lived. (R. 890.) We would visit from time to time the people that I have mentioned either by horseback or with a buggy. (R. 894.)

The maiden name of Mrs. Billy Dunn was Hutchinson and she lived on what was termed the north part of the (Malheur) lake. (R. 891.) I don't know the distance, but it was up there in the territory where Mr. Scott Haley lived. Mr. Hutchinson had a homestead.

Mr. BLACKMAR. The witness has indicated a place up here south of section 17, township 26 south, range 32 east.

Mr. LILJEQVIST. Your Honor, the witness probably doesn't understand the map. He is talking about the vicinity of Hutchinson's, and now, according to Plaintiff's Exhibit No. 21 (R. 891), the James Hutchinson property is patented lands in section 23.

Mr. BLACKMAR. Oh, that was patented long after. (R. 892.)

Mr. LILJEQVIST. Let him identify it by some person's residence. I don't want him to point it out on the map, unless he knows what he is pointing out.

The Hutchinson family lived on what was known as the Riley place on Malheur Lake; I knew them when they lived there, on the northern part of the lake; I presume they just took that as Government property; I don't know whether it was called the Riley property or not.

I have been up to the Hutchinson house and we went there either by team or on horseback, that is, on the outer part. They had some other property farther in the interior (of Malheur Lake) where they cut grass, but I have not been to that place.

Mr. BLACKMAR. Q. Do you remember this Simmons place up there?

A. Not in that part of the territory. Now, all those names I gave you were on the south border, and not on the north. I thought you asked me about another Mrs. Dunn, you see. That part is a misunderstanding by me, I presume.

The settlers that I named who lived (R. 892) directly east of me in Malheur Lake on Government land; they filed their intentions because it was surveyed land and to the best of my knowledge I do not think that they lived on unsurveyed land. Possibly they filed on smaller tracts, with intentions in the future to prove up. I do not know where the surveyed land is in there. I remember where Neal ran his survey through there, but I could not state definitely by number, distance, or (R. 893) anything like that, where the Neal meander line is.

Mr. BLACKMAR. Q. Could you tell whether or not these people lived within the Neal line?

A. I can sight you from our place going to the Hembree (R. 893) place, going east on the south border there. They surveyed right up through our tract, and we were interested in that part. I couldn't show you the line, but it was set in farther toward the lake, you see.

I could not tell you whether the Hutchinson family lived within the Neal meander line. That place was on the north side (of Malheur Lake) and that covered so much territory, we didn't interest ourselves to know anything about it. (R. 894.)

Cross-examination:

I can not tell you whether or not the places of the people I have mentioned, John Harper, Mrs. Simmons, Cass Hayes, Bert Simmons, Taylor Simmons, Jim Caldwell, Frank Dunn, or Mr. Springer, were on patented lands.

Mr. LILJEQVIST. Q. Now, you have talked about these people being inside the meander line; and you talked about the Sodhouse meander line. Were those people inside or northerly of the meander line that ran on the Sodhouse Lane. Is that the meander line you refer to?

A. What do you call inside—toward the lake?

Q. Yes. Inside toward the lake. (R. 898.)

A. No; it wouldn't be patentable if it were on the inside of the meander line. (R. 899.)

I am familiar with the Sodhouse Lane that goes past Springer's Spring, and as far as I recall the people that I have mentioned lived north of that line (the 1877 meander line). I do not know whether they were upon patented lands. I am not able to define that, but those people lived between the Narrows and Springer's Spring; they lived in that territory in what we termed the border of the lake, sufficiently close so that they could get their grass. Some of the lands of those people were closer to the lake than Billy Dunn's lands, but not knowing all that land in there, we just termed it that way; some cut more hay than others. (R. 899.)

I do not know whether the Hutchinson place that I have referred to where Mrs. Effie Dunn lived part of the time, is on patented lands; we presumed it was surveyed lands; we never bothered the other fellow as to his lands. I do not remember whether Mr. Hutchinson's first name was "James," that sounds familiar, cannot say positively. I do not know more than one Mr. Hutchinson's place in that community. I will state though in the early days, during one or two years he was living farther in the (Malheur) lake, but I don't know just where; principally where he cut his hay; do not know the time of the year he moved; he built a house farther out on the higher ground, and that was his home in later years during that time.

As years went by the settlers would cut hay deeper into the lake any time the water would recede sufficiently (R. 908); they would cut out as far as they could (R. 908).

Speaking as a whole, I do not know of any time but what they were not able to cut hay around the borders; that is speaking as a whole. We could always cut some. What enabled people to get hay crops on their patented lands around the border of the lake, was what we termed the overflow of the lake, that is what we termed it, as the water of the lake would rise, it would go out over their territory.

I visited neighbors north and west of the (Malheur) lake (R. 909), that would be northeasterly of the Narrows, and I visited our neighbors up there.

Mr. LILJEQVIST. Q. What I am trying to get, Mr. Hembree, is this: From your knowledge and recollection of that country during the average years, as you knew them, did the lake waters fill up and back up onto those patented lands sufficiently to enable them to raise hay crops?

A. Well, that last addition to your sentence there would kind of interfere with the other, whether it was sufficient or not, but the waters as the lake raised would go forward out on this raised land north; it was quite level, and it was just like going from nothing as the water was here, so to speak. (Indicating.) It was forced out on this other territory north, and around that border some places it would be out of course much farther than others; it was owing to the lay of that particular land.

Q. Owing to the particular land?

A. Yes, to the particular land. In some places it wouldn't cover it all, and other places there would be channels (R. 910), and it was forced out and covered that territory.

Redirect examination:

I have heard of Red Campbell when I lived there at the Narrows in the early days; I knew Ed. Grout and Scott Haley. All of those people had houses there northeast of where I lived at the Narrows, on the east side of Malheur Lake. As nearly as I know they got to their places by wagon and team and horseback; from time to time in the early days, and at all seasons of the year I have seen them coming in there; they never seemed to have much trouble with the lake in getting in there with a horse; they made it their regular home.

Mr. BLACKMAR. Q. So that evidently in getting into their places, they had to come through much shallower water than you found in getting up in your boat?

A. They never went that far as I travelled with the boat.

Q. Then there wasn't very much water up around where their houses were, was there? (R. 915.)

A. They were on the point of a gradual rise or elevation of the land, you see, from what we termed the main body of the lake.

Q. Yes. So while they had water around there from time to time, they didn't have so much but what they could go and come?

A. They could go and come as they naturally would go and come. They cut hay and stacked it and kept it down there. As far as I know there was hay cut to the south of the Haley (R. 916) place in the (Malheur) lake bed, I think there was, I wouldn't say positively.

Mr. BLACKMAR. Q. As a matter of fact, all over that end of the lake just east of you there was more or less hay cut all the time that you were in there?

A. East and north, yes; across from either side of the lake.

SPECIAL MASTER. On both sides you mean?

A. Yes.

Q. East of your holdings?

A. Yes; east of our holdings:

Q. And you said on the north side as well?

A. Yes; on the north side as well. North and northeast. (R. 916.)

I could not say how far the water of Malheur Lake recedes up there around the Sodhouse. (R. 918.)

Mr. JOSEPH WARREN BUCHANAN, called as a witness for the plaintiff, testified in substance as follows:

In 1885 when I first came to Harney Valley I became acquainted with Malheur Lake; at that time I passed around Windy Point on the east side of Malheur Lake. I did not stop to water the stock at the lake.

Since I have been in this country I have had an opportunity to be down in the neighborhood of the lakes pretty near every fall, hunting ducks, and the like. I never did work stock in there.

I have been all around Malheur Lake a number of times, but I am better acquainted with the west part, in below Lawen, and between there and the Narrows, that is on the north and west sides of Malheur Lake. (R. 920.) I went in there principally for the purpose of hunting.

When I went into Malheur Lake hunting, and if it was a very high year, we would have to have high top gum boots to wade the sloughs, for good hunting.

I don't think I ever hunted as far down as Scott Haley's place. I hunted in and about the Adam George place, around the sand reef.

(NOTE.—There is no house on the Adam George place, but it lies right east of Doc. Graves' property. On this status diagram, showing title of ownership to the lands, Plaintiff's Exhibit No. 22, which is known as the Adam George land is (R. 921) under the name of Mary George, and it is lots 1 to 3 inclusive of section 1; lots 1, 2, 6, 7, 8 and 9 of section 2, all in (R. 922) T. 26 S., R. 32 E., north of the lake. Thereupon Mr. Pecore indicated to witness the place on the map.—Pecore (R. 922).)

Mr. Hayes has the adjoining place. It is right in that neighborhood that we did most of the hunting. (R. 922.) I have been on the Red Campbell place but I do not know for what purpose. We were through there in 1909 classifying all the lands. I was all through that country, including Mr. Campbell's place. We were looking up all the land, classifying it. At that time I was deputy assessor. I was not giving attention in particular to anything outside of the deeded lands. We were just looking over the character of the lands, so as to know what price to put on it. We did not assess any of the land that was not patented; we just looked over the

patented land and we did not assess Mr. Red Campbell's land (R. 923) or Mr. Bunyard's. I was deputized to help classify the real estate. Before that time I was the assessor. We were just merely classifying the soil. Mr. Red Campbell's property was never on the assessment roll. I had been there visiting. They were located on either State or Government land down in Malheur Lake, but anyway land that was not patented or assessed.

We got out to Campbell's place with a team, we had no trouble getting there at that time. (R. 924.)

If it was the year that we were on that land classifying it, it was late in the season when we were there, because we couldn't get in there on account of the mosquitoes.

Mr. BLACKMAR. That is something, your Honor, that hasn't appeared before. (R. 925.)

SPECIAL MASTER. A new element in the case.

Mr. LILJEQVIST. Trying to prove they couldn't wet their land with mosquitoes around.

I think we went in there around those places when we were classifying the land, or aimed to after the hay was cut. In a normal year they had quite a little hay cut and stacked around in there.

Jim Bunyard lived down there in that neighborhood. I have not crossed the lake with a team or on horseback, nor did I use a horse to ride down there in the west end of the lake when I went hunting. (R. 925.)

Cross-examination.

I do not remember about the channel over there by the Red Campbell house; I was there only once.

In classifying those lands we had a plat of the meander line. It was patented land, and we just go in there to find out the general character of the land so as to place a valuation on it; we would look at what was patented or surveyed land.

I was in there classifying those lands in 1909, I think.

Mr. LILJEQVIST. Q. I want you to state, among those surveyed lands, whether in your judgment the normal high water in the spring came up to that (Neal) meander line.

A. I couldn't say whether it came to the meander line at that particular time, or not; but it did sometimes come to the (Neal) meander line; and sometimes farther out.

By farther out I mean farther out than the (Neal) meander (R. 929) line; in high water it came onto the patented lands farther in shore.

Mr. LILJEQVIST. Q. From your observation of the lands in looking at them, it was your opinion that the normal high waters of the lake backed up and irrigated to some extent the patented lands?

A. Yes, sir. (R. 929.)

We went around the east side of Windy Point. I could not say where the water of Malheur Lake came with reference to Windy

Point in 1909; there was no land along on the east side, only salt grass land, about the same character of land, so that we just passed over that and took no notice of it. We did not go around and run any subdivisions, or anything like that; the character of the land was about the same all through there, with reasonable uniformity. With reference to the western part of the lake and my observation as to how far the meander line was in from the edge of the tules, I think that the settlers there had been cutting hay to the meander line, and a great many times if the lake was low, they would go inside of the meander line and cut some coarser hay.

I think in normal times of high water the lake came out to that meander line. (R. 931.)

Redirect examination:

At times it went above the meander line, and some years it didn't reach that line.

Mr. BLACKMAR. Q. So that there isn't anything very (R. 932) stable about that?

A. No, sir.

Q. And as you were going along that north side of the (Malheur) lake, there isn't anything in there on the ground that shows you where the lake commences and stops; that is, a bank, or anything of that kind?

A. No, sir; not on the west side.

Q. It just slopes right on down?

A. Yes, sir.

Q. In a gradual slope?

A. Yes; in a gradual slope.

I never had occasion to water any stock or horses in the lake at Windy Point. The county had a well there, and we always watered our horses at the county well at Windy Point.

Mr. BLACKMAR. Q. Now, as you watered your horses there at Windy Point, and looked out toward the (Malheur) lake, could you tell how far the water was?

A. Sometimes you could, and sometimes you couldn't. We have a mirage in this part of the country which shows up, and it looks like the water is right up close to you, when, in fact, there isn't any water. (R. 932.)

Q. Right up at that particular location of the lake there is a good deal of open space, isn't there?

A. Oh, yes.

Q. And as you stand there and look at the water, the sunlight and the atmosphere would make it very difficult to tell just how far the water was out?

A. Yes, sir; it was pretty hard to tell.

I have never seen anyone else drive stock out there and (R. 933) water it at that place. I saw stock coming or going, and the riders coming out that way after stock. (R. 933.)

Recross-examination:

Mr. LILJEQVIST. Q. Now, that is in recent years that you looked out and saw mirages, and you couldn't tell how far the water was?

A. That is quite often the case.

I do not know how far the water (of Malheur Lake) was from the bank at Windy Point in 1909. The road runs out quite a ways from the lake; you just give a passing notice and look out there; don't take any notice of it. You can see water, and the ducks and geese and things on the water from the road. (R. 933.)

With reference to whether the vegetation on the westerly side of Malheur Lake indicates where the approximate border of the lake comes, the salt grass runs out quite a ways; then the lake bed just slopes gradually; there is where the salt grass goes to; there is a border clear around there.

Mr. LILJEQVIST. Q. In your judgment, the lake came up to that salt grass?

A. Quite often, yes, sir; most of the time.

Q. Would you consider the salt grass area the approximate border of the lake?

A. Yes, sir.

Q. And wasn't that what the settlers down there usually talked about as the lake border?

A. Yes, sir.

Q. And that salt grass was located where, approximately (R. 934) with reference to the Neal meander line?

A. I suppose so; yes.

Q. Was it located fairly close to the Neal meander line when you observed it in the year 1909?

A. They went in as far as they could survey the lake, and established that last meander line. Mr. Neal established it there. That was established since I have been here.

Q. And in your judgment, in going over the land and classifying it for taxation purposes, what is your judgment as to whether that Neal meander line in that northwest area was approximately where it ought to have been? (R. 934.)

Mr. BLACKMAR. Well, I don't know as the witness can answer a question of that kind as to where it ought to have been. That would probably require some kind of an explanation as to where it ought to have been.

Mr. LILJEQVIST. I will put it this way:

Q. From your judgment in classifying those lands, would you state whether the Neal meander line at the northwesterly line of the lake was approximately where the normal water came in the springtime in seasons of high water?

A. I think it was, as near as I could get at it. (R. 935.)

Redirect examination:

Some years the water would come above that line (Neal meander line), and some years it would be below it, I think.

Mr. BLACKMAR. Q. And in some places around the lake there were tules above the meander line, were there not? (R. 935.)

A. Oh, yes.

Q. And in some places there is salt grass away below the (Neal) meander line?

A. Oh, yes; there are places that they never surveyed.

Q. And where they cut hay?

A. Yes.

Q. The salt grass is cut as hay?

A. Well, the salt grass may have several different and coarser grasses in it, you know, and when the lake is low they (R. 935) cut that.

Q. Practically every year that you have been out there, you have seen this grass cut below the (Neal) meander line, and put in haystacks out there, haven't you?

A. No; not every year.

Q. In a good many years?

A. Yes.

Q. And can you remember a year since you have been here that there have been haystacks below the (Neal) meander line?

A. No; I couldn't state what years they were.

Q. But the common ordinary thing is to cut grass below the meander line?

A. Well, quite often they get in there late in the season; they can not cut until away late, until the lake recedes, to cut some of the grass inside of the (Neal) meander line.

During the last two or three years Mr. Campbell has not cut hay, but that was not because he had too much water. Several of those fellows inside of the (Neal) meander line did not get any water this year, that is why they didn't get any hay. But in the (R. 936) years they have water they cut hay there except when it is too wet.

Mr. BLACKMAR. Q. How many years since 1888 would you say there was so much water down there that you couldn't cut hay within the meander line?

A. I don't think there have been very many years but what they got some hay.

I could not say whether they didn't get much hay in 1894 because it was pretty wet; I was not there very many times during the haying time. (R. 937.)

Recross examination:

Mr. LILJEQVIST. Q. This hay, was it cut upon the higher parts of the meander line known as islands, or called islands in this case?

A. Well, I couldn't say, but they would go in there wherever they could get it. (R. 937.)

Mr. WILLIS GEORGE BARDWELL, called as a witness for the plaintiff, testified in substance as follows:

I have not cut hay down there in Malheur Lake. I do not recall Cunningham's place. (R. 953.)

Cross-examination:

I cannot tell what a man would call a normal spring. I have seen it higher sometimes than others. The crest of the spring floods would come in June (R. 955); when they started, would depend upon the season. When the chinook winds would come the snow would melt and come down the rivers. I have seen the spring break-up water come in February. I have never seen the water come to the lake in February. It generally froze up before it got there. I have seen the water run into the lake in March.

Mr. LILJEQVIST. Q. And it kept running sometime in June or July?

A. No, sir, not that late.

Q. Up until when then?

A. Not up Silver Creek way. I was out that way more than around the lake. I couldn't say as to the conditions around (R. 956) the lake. (R. 957.)

Mr. JAMES M. BRANDON, called as a witness for the plaintiff, testified in substance as follows:

I remember on one occasion I was with a party moving cattle from the Island Ranch to Winnemucca, Nevada; most every fall I moved cattle through to Winnemucca; I drove cattle there; and I went through with a good many bunches; they were pretty good-sized herds (R. 960); in making a trip to Winnemucca with the cattle sometimes we would go by Windy Point and Saddle Butte.

There was one trip I went across the lake down here by Swan Lake, across by the Sodhouse, with 500 head of big steers, which I was taking to Winnemucca. There were eight men altogether in the party; one man and I had to go ahead and put hay along the line; there were about six men with the cattle all the time. Those cattle were three or four year old steers, and they would weigh about a thousand or one thousand two hundred pounds; they were big steers, most of them four years old.

We entered Malheur Lake on the north side; we went from the Island Ranch down to what (R. 961) is called the Swan Lake Field.

(Mr. PECORE. I do not think the Swan Lake Field is identified, but what I understand is known as Swan Lake is located right near Vickers' house. (R. 962.) Swan Lake has been located on Plaintiff's Exhibit No. 3. (R. 996.))

The WITNESS. I know where Vickers' house is; we passed to the east of it, right close to there; there was a man in there by the name of Joe Hill, living there at the time we crossed the lake there; we just went to the left of his house, and then to the Sodhouse.

(Mr. BLACKMAR. Will you make a note of Joe Hill and see if we can locate his place, Mr. Pecore?

Mr. PECORE. All right, I will.

A VOICE. That is the Huffman place.

Mr. PECORE. He said it is the Huffman place near the Vickers' place, or right below the Vickers' house, as shown on Plaintiff's

Exhibit No. 3. (R. 962, 963.) The Hill place is pretty well defined on the map, Plaintiff's Exhibit No. 3. (R. 1000.)

The WITNESS. I took those 500 cattle across Malheur Lake in either 1888 or 1889, somewhere along in there. In making the crossing we did not lose any of them; they did not get stuck in the mud. (R. 964.) There was a little water in that section of Malheur Lake just before we got to Mr. Hill's place; they had a little tule road that ran around through there, and the steers got to that water, and scattered all through there; there was a channel there and they watered right there.

Mr. LILJEQVIST. Have you the Hill place identified.

Mr. BLACKMAR. No, we haven't; not yet. It is down there near Campbell's place.

The WITNESS. We all rode through there on horseback and I should judge that out in the middle of the channel it was probably three feet deep with water, and then there was the mud under that.

When we were going through there the ranchers were not cutting hay, because it was in the fall. I am sure there were a few stacks of hay down in that country, towards the Narrows. (R. 965.)

During the time that I have been familiar with Malheur Lake that part of it used for winter pasturage of cattle was mostly from Saddle Butte down almost to the Narrows, down in there on that side (the north) of the lake. All of this side of the lake (indicating). There were quite a few cattle that wintered on the other side, the south side farther down toward the Narrows, but the biggest bulk of the cattle was on the north side.

Mr. BLACKMAR. Q. Was there a place down there toward the Narrows where they wintered cattle clear across from the north side to the south side?

A. Yes, sir; in the winter the cattle ranged across there; there was quite a lot of cattle from Sodhouse Springs and above, clear across the lakes in there.

Q. Do you think that a line drawn north and south through Sodhouse Springs, that you could pasture cattle in all that part of the lake, west of that point?

A. Yes, sir. (R. 966.)

There was quite a good bit of cattle that wintered up in the east end of Malheur Lake. (R. 966–967.) The cattle fed on salt grass on the shores, and when the lake was frozen they would go into the lake on the islands and places all along there for feed. It froze up solid. A little snow would fall on the ice and the cattle would go on the ice away out in the lake.

I have had occasion to go by Windy Point and Saddle Butte with cattle. I took a bunch of cattle in there from the Island Ranch to Saddle Butte; right below the butte there was a little channel, and a little lake of water that extended out for quite a ways, and we would let our cattle stay on the water there. That

was a kind of a slough in there (indicating); but back a little farther the water extended out quite a ways.

I remember the well that the county maintained at Windy Point. I have passed there a good many times. (R. 967.)

Mr. BLACKMAR. Q. Now, from that well, how far have you seen the lake away from that point; or how close have you seen it to that point?

A. Well, from Windy Point down to the lake I should judge it was half a mile, or a little over; and there were certain times of the year there would be a little water in there, but in the fall when we were driving beef the water was away back, and we never watered any cattle there.

Q. When you say "away back," how far do you mean in miles?

A. Well, I would say it was a good mile back in certain times of the fall when there would be water away back in the lake.

Q. And that was the situation as it was in the early days when you first came there?

A. Yes, sir; that was the situation in the early days.

Mr. LILJEQVIST. Is Mr. Brandon referring to a mile back from Windy Point, or from what place? I do not quite understand.

Mr. BLACKMAR. I thought he meant a mile back from the well. (R. 968.)

Q. You said the water was out a mile, and from what point do you mean?

A. Well, I meant from Windy Point.

Mr. BLACKMAR. Yes.

From the edge of the lake out to the water I would say it was a good mile out to the water.

I have been there many a time at Windy Point and have seen a sort of a little bank there about a foot or a foot and a half high. I have seen the water, when the wind was blowing, out to where the road was; it would splash out over that bank, and there would be little channels that were washed out, and it would run back out in there, and then just flooded out a little ways, but it would only stay there a little while. I am talking about the road that was next to the lake; the road that was away out.

I have seen the water of the lake when it was half a mile or a mile out west from that bank; and then again I have seen the whole (R. 969) thing when it was dry clear across. (R. 969–970.)

Mr. BLACKMAR. Q. It didn't seem to have any fixed point where it came every year? You couldn't tell from one year to the next where it was going, could you?

A. No, sir.

And that was the condition that existed on the lake all the time you have been familiar with it?

A. Yes, sir.

Q. Now, when you got down on the north shore, and on the south shore, it is pretty difficult to find any bank there at all?

A. No; you couldn't.

I have not seen a bank on the north or south shores of Malheur Lake, and I worked cattle there a good many years. It is pretty hard to tell where the lake begins and where the land ends. (R. 970.)

Cross-examination:

With reference to Windy Point when the wind was strong it would blow the water through the gaps in the bank. (R. 994.) The road I referred to came from Windy Point up towards Saddle Butte, and ran right by the old county well.

When I was talking about the wind blowing the water through the gap onto the road I was referring to above Windy Point. In high water time there was a little place on the other side of Windy Point, just about south, just off to the right of the road that was going toward the hill, where the water used to back out, I would say pretty near a half a mile; it shot back out there. As we were traveling northerly on the road toward Windy Point we found water away back there. (R. 995.) I do not know where the old Meldrum line (of 1877) was south of Windy Point. (R. 995, 996.) When I saw the water practically due south of Windy Point at the place that I have described it was along in the latter part of the eighties, I do not know just what year it was.

It was in the fall of 1889 that I drove the cattle across the land (Malheur Lake) from Swan Lake to the sod house.

(NOTE.—Mr. PECORE. "Swan Lake" has now been marked on plaintiff's Exhibit No. 3, Mr. Liljeqvist. R. 996.)

When I crossed (Malheur Lake) with cattle, I went right across from what they call Swan Lake there (on the north side of Malheur Lake) to the ranch that Mr. Hill used to own (on the south side of Malheur Lake); it was almost in a straight line—(from Swan Lake) right over to the Sodhouse.

Mr. LILJEQVIST. Q. There is a higher point right to the east of Swan Lake, wasn't there?

A. Yes, sir; this way (indicating).

Q. Did you cross there?

A. No; I didn't cross no point.

There was water in a little channel close to Mr. Hill's place. We crossed south, and we came out right over by this side of the Sodhouse (R. 997), that is, north of it. I crossed the lake from north to south, and came out on the north side of the Sodhouse. We went into the field with the cattle, about a quarter of a mile from the Sodhouse toward the narrows.

I have crossed there a good many times; that was a few years after I crossed there; we used to cross there. (R. 998.) We used to cross there in the summer time and in the fall; never cross that place on the ice.

I can not tell you exactly what years I crossed there after 1889, but it was most every year we were over there bringing cattle back and forth to the Island Ranch where I worked; I paid no attention to the years.

Mr. LILJEQVIST. Q. The Island people did not run cattle down on the swamp, did they?

A. We used to get a lot of cattle over there, and bring them across to the Island. They had cattle on the other side of Steen's Mountain and Happy Valley, and that country, and I used to have a man who worked with those people, and they would gather up those cattle and we had to go over there and get them; sometimes they had three or four hundred head of cattle that we had to fetch to the Island Ranch.

I can not give you the years now, but it was along in the fall we always would go after the cattle.

There was a little water on the lake down there at that crossing by the Hill place (R. 999), that is just the other side of the Hill place. I believe Mr. Vickers owns the property now.

(Mr. PECORE. The Hill place is pretty well identified on the map.)

There is just one place in there where there is a little channel, this side, and the water was two or three feet deep there, and then came the mud; we never had any trouble crossing.

I never crossed there in the springtime.

Mr. LILJEQVIST. Q. You couldn't cross there until after August, could you?

A. Until after August?

Q. Yes.

A. I never tried to cross.

Q. What is the earliest part of the year that you tried to cross?

A. Well, it would be along in August or September.

Q. Did you find years when you couldn't cross at all during that time in August or September?

A. Yes; there were years that we never crossed there.

I do not know anything about the meander line.

I have never owned any lands or deeded lands around (R. 1000) the meander line. I was there in 1895. I think it was the year when they had quite a lot of water there on the lake, in the spring, if I'm not mistaken; there was not more water that spring than any other year.

Mr. LILJEQVIST. Q. Now, there is some testimony that the spring of 1894, they had a lot of water. Are you talking about 1894, or are you thinking of 1895?

A. I think it was about 1895. (R. 1001.)

In the springtime there were some years I have seen it down there when it was pretty hard to get out on those islands in places on account of the water.

Mr. LILJEQVIST. Q. Now, in your judgment, when you first knew the country, where did the water ordinarily come with reference to Windy Point in the spring months; particularly May, June, and July?

A. Well, it backed up from the lower part of the lake, down this way, back up to Windy Point, the waters from the Blitzen River, and the waters from these springs here. (R. 1002.)

With reference to Windy Point the water of the lake backed clear up to those banks on the other side of Windy Point; and there were some years it would back into the Nine Mile Slough and west there; the lake itself backed out a little ways into the Nine Mile Slough. (R. 1003.)

Redirect examination:

With reference to the driving of a herd of 500 cattle, the distance that we would cover in miles a day depended upon the stopping places and the pasture; some days we would drive 20 miles, that is a pretty good drive for a bunch of beef cattle; other days we would make shorter drives to pasture, something like 10 or 15 miles or thereabouts. (R. 1003.)

Mr. JOSEPH WILLIAM CLARK, called as a witness for the plaintiff, testified in substance as follows:

Since I have been in Harney Valley, from 1886 or 1887 (R. 1022), from time to time I have been in Malheur Lake engaged in the operation of swamping cattle.

Mr. BLACKMAR. Q. And you have heard the witnesses here in the court room describe that, have you not?

A. Well, part of them. I was not here all the time.

Q. That is the general situation with regard to swamping cattle as they have detailed it?

A. Yes, sir.

I did not hear the testimony given by Mr. Kilburn.

I was riding for myself. We turned the cattle loose up near Harney there and then they drifted down to the lake. I did not take them to the lake at all when I first went there. (R. 1023.) I did not allow them to remain there all winter, but just as fast as I found them on the lake, I began taking them to the feeding ground. I found my cattle from the west of Saddle Butte into about south of the old town of Lawen; and they were about four or five miles south of Lawen; they were down in the tules; I did not find any in the lake. (R. 1024.)

In order to get the cattle, I had to ride into the tules. There was water farther back in the tules, that is, farther south.

I went around Windy Point in the summer of 1888 or 1889; it was on the south side, what they call Springer's Spring, but I was not at Windy Point when I was gathering the cattle the first time I was down there (in Malheur Lake). (R. 1025.)

I have been familiar with Malheur Lake since 1886 or 1887 (R. 1022) off and on except for the last 25 years. I sold out to the Vickers boys (to Jess and Lynnie Vickers, R. 1040) and I have not been back to the lake with my cattle any more.

I do not think that the tules that I saw in 1888 or 1889 in that area west of Saddle Butte to about the south of Lawen (R. 1024) are there to-day; it has been pretty well cleaned out. (R. 1025.)

I do not know that there were any ranches in the lake bed when I first became familiar with Malheur Lake. They were around the

edges of it; they were supposed to be on the boundaries of the lake, but I did not know where the boundaries were at that time.

I knew a man by the name of Hill, but I never was at that place but once which was about three years ago; they said it was Joe Hill's place and that is all I know about it.

I was acquainted with Jason Bennett but I have not been to his place. (R. 1027.)

I do not think I visited any of the ranches down there before 1890. (R. 1028.)

Mr. ROBERT HAMILTON BROWN, called as a witness for the plaintiff, testified in substance as follows:

When I first came to Harney Valley I came around the northeastern side of Malheur Lake, around by Windy Point. I came with a pack horse. I did not camp there; we camped in the valley and then went on to Happy Valley. Then I came back and went to work for one of the ranchers and located over by the Island.

I remember when I had occasion to go to the Island Ranch in 1889, after some bucks for Charlie Riley. He lived on what was called the Red "S" Field, which was afterwards called the Red "S" land. He lived right on the river, and the house and barn was about a quarter of a mile from the Island property. (R. 1084.) In going into the Red "S" Field I came around by Windy Point and then in from the northern part of the valley. I went to Riley's place and stayed all night and the next day I got about eight bucks in a wagon; the bucks weighed about 150 to 200 pounds each. When I left I followed a route south and east. Mr. Riley told me there was a tract there where the lake was drying, and I could go through that way and cut off several miles, or a lot of miles; he said to follow right along down the salt grass until I saw where the tracks started in at the lake; that there had been teams across there. I had no difficulty in finding those tracks. The wagon had two horses. I went right out across the (Malheur) lake bed. (R. 1085.) I came out on the other side of Malheur Lake not far from where the Sodhouse is now. That would be west of the (Sodhouse) Spring and where the Blitzen River goes into the swamp. I had no trouble with mud or water in following that route. It was dry.

I have not made a good many trips on the road that runs from the Narrows and by the Sodhouse Springs. In coming out from Happy Valley the route ran to Diamond; that was our nearest route outside of there and we didn't come to the Narrows at all. (R. 1086.)

I have not cut any hay down in Malheur Lake. The time I crossed Malheur Lake with the bucks (1889) was the only occasion I had to go across there. (R. 1087.)

Cross-examination:

The year that I went across there with the bucks I think was in the fall of 1888 or 1889, I am not sure which one of those years it

was. I think that was the driest year I have ever seen in this country outside of the last two years. It was the driest while I was in the country.

I can not tell you where I entered the lake on the north side, because there was no settlement in there at that time. I do not know where Mr. Graves lives; nor do I know where the mouth of the west branch of the Silvies River enters the (Malheur) lake. I know where it runs down through the Red "S" Field. (R. 1087.) Mr. Riley's house was on the east bank of the Silvies River. I do not know whether it was on the east bank of the west fork of that river, but I think it was the west fork. I started from his house, and I went across the (Malheur) lake to somewhere westerly of Springer's Spring. I do not know how many miles westerly of that Spring that I came out, but it must have been two miles, I think, from the Spring, anyhow. The road wandered there some; it didn't go exactly straight across (the lake). I did not have to go through any water at all that year.

I could not tell you whether there was any water easterly of me. I did not see any. There was no water where I crossed (the lake); (R. 1088) and there was none in sight that I could see.

That same year I went past Windy Point when I came over to Mr. Riley's and I do not remember of seeing any water there at that time. I got in there late and left early the next morning, and I do not remember what the conditions were.

After that I passed Windy Point many times when I went up to Happy Valley, and in those other years I saw the water right out and close to that little reef they talk about, or little bank, (in the vicinity of Windy Point). I saw the water close to that (bank), and I have been along there when it was away back so that you could hardly see it. That was several years ago, I can not say exactly (R. 1089), but it was prior to the last ten or fifteen years because it has been ten or twelve years since I left there and went down to the lower end of the valley.

I lived up in Diamond Valley; I had a ranch there and I have one there now up on the creek.

Mr. LILJEQVIST. Q. And at the time you went in there, isn't it a fact that the sagebrush land has been irrigated on the Blitzen (River)?

A. No, sir; there hasn't.

Since I have been in there there has been some water run out on that Big Sagebrush Field. Ever since I have been in that country they have been draining the Blitzen Valley.

Mr. LILJEQVIST. Q. I am not talking about the drainage, but I am talking about the tributaries of the Blitzen. Isn't it a fact that from the time you went in there as a settler that they have increasingly been putting water on that sagebrush area to your knowledge? (R. 1090.)

A. In the Diamond Valley.

Q. And the Diamond Valley is a big valley, is it?

A. Well, it is a tolerably large valley.

Q. There is a lot of sagebrush land that has been put under sub-irrigation since you first knew about it, isn't that true?

A. Yes.

I can not tell you the last time I went past Windy Point. (R. 1091.)

It was before the hard winter when we had a lot of snow and during the dry period that I crossed the lake with the bucks in the wagon After the wet period came I had no occasion to try to cross the lake again but I don't think I could have.

Mr. BLACKMAR. In connection with the testimony of Mr. Brown, I want the record to show that the Red "S" Field is three miles north of the Howell oil well.

SPECIAL MASTER. Where is it, between the east and the west forks of the Silvies River, is it within those points? (R. 1092.)

Mr. PECORE. I think it is entirely west. Isn't the Red "S" Field entirely west of the Silvies River on the south side?

Mr. BLACKMAR. Mr. Brown says the Red "S" Field starts right at the Island Ranch.

SPECIAL MASTER. And the Island Ranch is shown on this map (Plaintiff's Exhibit 3) as between the two forks of the Silvies River?

Mr. LILJEQVIST. Most of the Red "S" Field is west of the west branch of the Silvies River. I think that is correct. (R. 1093.)

Mr. GEORGE FRY, called as a witness for the plaintiff, testified in substance as follows:

I remember at one time I was working for Mr. French building a fence down toward Malheur Lake. I think we built the fence for about three miles west from the Sodhouse Spring on the (R. 1123) 1877 meander line. I think that was in October. The water was not anywhere near the meander line, except in the (Sodhouse) Spring; that is only in the little lake, the Sodhouse. From time to time I have seen the water above the 1877 meander line.

Mr. BLACKMAR. Q. And I presume you have seen years, a good many years, when it did not come to the meander line?

A. Yes.

Some years the water went over the 1877 meander line.

I have no knowledge of the locality of the Neal meander line (R. 1124) and I can not give any definite information about it with reference to the action of the lake there. Over where we were building the fence, along that meander line, that ground in there is overflowed from the Blitzen River.

Mr. BLACKMAR. Q. So that some years there is water on it in advance of the rising of the lake, is there not?

A. Yes.

Q. And when the (Malheur) lake comes up and joins the (Blitzen) river overflow, it is pretty hard to tell what land gets its water from the river and what land gets its water from the lake?

A. Yes.

The route taken by me in driving the stage was from Burns to Windy Point, thence to the Sodhouse, thence to Diamond, and then to Fort Bidwell. That was about 2½ months in the early summer from June to about August, and then the lake went down, and I drove by Wright's Point and across the (Malheur) lake to the Sodhouse; that was in 1889.

Fort Bidwell is in the northeastern part of California. (R. 1125.) I drove the stage all the way down to that place. (R. 1125–1126.) It took three days to get there; it is 216 miles. I drove a stage between Burns and Fort Bidwell. I just drove it the one year, in 1889. When the lake had gone down, we entered the lake bed about three miles east of the Narrows, that is, going south, and we came out, I think, at the Reinemann place; it was the John Anderson place at that time; that is about three or four miles west of the Sodhouse Spring. That is where I came out on the south side of the (Malheur) lake.

(NOTE.—Wright's Point is about six miles up (from Malheur Lake), and ends right at the Island Ranch, or very close to that.—Pecore. R. 1126.)

I remember the Red "S" Field; I went through there on my way down from Burns. I know Mr. Haley, but I never was at his place there in the lake; I have heard of it, but I never was there, unless I went through there when I was driving the stage.

I do not know the Cunningham place.

In 1889 there were some people living on the south side of Malheur Lake, but I did not pass any house on the north side. I knew Jason Bennett, Ed. Grout, and Scott Haley. In coming down through there (Malheur Lake) (R. 1127) I think I would pass in sight of Mr. Haley's house, but I don't really know where these other people live.

I have never driven the stage in any other years, and I never did any freighting except for myself.

When I was driving the stage, which consisted of a kind of light sort of a wagon, and two horses, through there, I did not get stuck in the mud.

After 1889, I only had occasion to go around Malheur Lake in the spring of 1890. I left there then and came to Burns. About 15 years later, I was back around the lake on the south side. I have been on the north side of the lake. (R. 1128.)

Cross-examination:

1889 was the only year that I drove the stage, and I passed by Windy Point up until the middle of August (of that year).

1889 was the driest year they had in those early days. The previous year was a dry year. 1888 was dry, and 1889 was drier. (R. 1129.)

Mr. LILJEQVIST. Q. In fact, that was the driest year we ever had until about 1917, then the last few years, is that correct?

A. Yes.

I drove through there (western half of Malheur Lake) with that stage about the latter part of August, which was the first trip. I did make a few trips around by the Sand Reef before it was dry enough to cross the lake. For a while up until August of 1889, you could not go across there. When it dried up sufficiently, we went across where I have described, on the higher ridges, or little elevations through Malheur Lake.

There were not so very many open places through there; it was mostly tules and cane. The first time I started to drive through there was about the first of June, 1889. (R. 1130.)

June 1, 1889, the water of Malheur Lake, with reference to Windy Point, I think was far back from the shore. I really do not know if there was any water; I don't remember.

I don't think you could drive through there in the early spring of 1890, and I did not drive through there. (R. 1131.)

I think the highest water was either in 1894 or 1895. I do not believe there was very high water between 1890 and 1894. (R. 1132.)

Recross-examination:

Mr. LILJEQVIST. Q. As I understand it, it is true, of course, between the springtime and the fall there is a drop along the edges of that lake?

A. Yes; as a rule, the lake does not fill up until about July; the water does not get to the lake until about July from this side. Well, on the other side, of course, the water comes down there in February quite often, and in June that is the high water time over on the Blitzen.

There is a different high-water period on the Silvies River and on the Blitzen River. (R. 1139.)

Mr. LILJEQVIST. Q. We might as well get that in the record. What is your (R. 1139) recollection of the high-water time on the Blitzen?

A. Well, we used to have the run-off there from the lower foothills along about February, and then in June we would have what we would call the June rise of the river from the snow from the Steen's Mountain.

And on this one here (the Silvies), it usually starts to run-off about the 1st of March, and I think the high water usually gets the highest along about the 15th or 20th of April, in the Silvies River.

Mr. LILJEQVIST. Q. Now around this lake: The question I was asking you is, from your observation of the country, was there any particular line or kind of vegetation that grows immediately above the normal high-water mark of the lake, and what is that vegetation?

A. Well, it is a salt grass. (R. 1140.)

Redirect examination:

I am referring now to about around the whole lake. I have been around the whole lake in recent years. (R. 1140.)

Mr. BLACKMAR. Q. The fact of the matter is that most places on that lake there is no bank, isn't that a fact?

A. Yes.

Q. So that a person who has no knowledge of the meander lines, it would be very difficult for him to state where the lake commences and where it ends?

A. Well, where the lake covered the ground for many years, why nothing grows on that, and just immediately back from the water line it grows salt grass.

Q. And as the lake recedes and as it stays receded, this salt grass grows from year to year, doesn't it? There is more salt grass down there now than there was in '85, isn't there?

A. Well, I never paid much attention lately whether the bed of the lake is covered with salt grass or not.

There are a lot of places around the edge of the lake where tules have been burned off, but I don't know whether the salt grass grows there or not, but I presume that some kind of grass grows there.

Mr. BLACKMAR. Q. Let me see if I understand you: Do you say that the lake bed is bare and then where the lake ends then the salt grass commences to grow?

A. Yes.

Q. Is that right?

A. That is it.

Q. So that any place where you have tules in there, do you (R. 1141) call that lake?

A. Well, tules have to have water over them to grow.

Q. At least, they have to have wet feet in order to grow?

A. Well, they usually die unless the water stands up over the stalks.

Q. And when that water around the tule is drained off for a period of years, then you get salt grass, don't you?

A. Well, usually it comes back into sugar grass, or some other hay grass that makes hay.

Sugar grass is a grass that requires lots of water; salt grass does not require very much water.

Mr. BLACKMAR. Q. In those sections of the lake which (R. 1142) are alternately dry and have water on them, does the salt grass grow there?

A. No; salt grass won't grow in water very long. Water will kill it.

Q. Water will kill it?

A. Yes.

Q. So that in places down there where you have salt grass, that means that the lake does not get over it, is that right?

A. Yes.

Q. That is your opinion?

A. It might get over it occasionally, but it doesn't stand over it from one year to another.

Q. But if it just gets over occasionally, it doesn't kill it?

A. No; it will grow.

Sagebrush will not grow in water; it takes very little water to kill sagebrush; if water gets on it, if it is hot, it will kill it in two or three weeks.

Mr. BLACKMAR. Q. Now, you think in all parts of this lake where you have been that this line of demarcation exists between dry lake bed and salt grass?

A. Yes.

Q. And you say that the water comes to where the salt grass commences to grow?

A. Yes, sir.

I do not know anything about the location of the Neal meander line. (R. 1143.) That was run after I left the (Malheur) lake.

Mr. BLACKMAR. Q. So that if the salt grass shows down below the Neal meander line, then you still maintain that that is the edge of the lake?

A. Well, of course, these dry years, I would imagine a good many dry years would cause the salt grass to grow down in the lake.

SPECIAL MASTER. You mean follow down the recession of the lake?

A. Yes.

Mr. BLACKMAR. Q. Then if that is true, it is pretty hard, isn't it, for you to say where the lake commences and where the lake ends?

A. Well, you take the east end of the lake there, and I think you will find the salt grass comes right up to the lake shore.

Q. Well, under your theory of this salt grass, doesn't it change from year to year with the recession of the water?

A. Well, I presume it would, if there was several years; the salt grass would begin to grow down where the lake was—where the water was.

As the lake rises in other years, it would die, and other green grasses would come, if it stood there for any length of time.

Mr. BLACKMAR. Q. That being true, isn't it a fact that you can not tell (R. 1144) from one year to the next where the salt grass is going to grow?

A. Well, it takes several years, I think, for salt grass to grow in the bed of the lake.

I do not know whether there is salt grass growing in the bed of Malheur Lake right now.

When I went down to the Sodhouse Springs I crossed the (Malheur) lake at the Narrows, but I do not remember whether there was any salt grass there or not where at one time I saw water, but when I was down there a few days ago, I did not pay any attention; but as a rule where the water dries up in those lakes down there, it grows a foxtail, that is the growth as a rule. Foxtail just wants overflow water. It is really better if it does not stand on it for any length of time.

If foxtail does not get water for several years, then it continues to grow and it does not die out, and it does not die out whether it gets water or not. I do not think that if it did not get water for five or six years it would die out. (R. 1145.)

There is lots of it around here. It does not do so well. It still holds a root there, and when that moisture comes, it commences to grow again. You never could get rid of that foxtail in this country. (R. 1146.)

Mr. JAMES HENRY GIBSON, called as a witness for the plaintiff, testified in substance as follows:

I have worked down in there near Malheur Lake (in the eighties and nineties). (R. 1169.)

Mr. MARCELLUS B. HAYES, called as a witness for the plaintiff, testified in substance as follows;

When we first came here we settled on the east fork of the Silvies River, about 2½ miles from the Island Ranch, the Pacific Livestock Company's holding. I took up some land there and built a house on it and continued to live there about 25 years at that one place.

Mr. BLACKMAR. Q. In those early days, did you get a good deal of water on your place?

A. Well, of course, the seasons vary—we settled there in the spring of 1887. 1888 and 1889 were unusually dry years. The winter of 1889 and 1890 was an extremely hard one, lots of snow and lots of water in the spring.

We got our water on that place of mine from the east fork of the Silvies River which ran right through our land. It was unsurveyed land at the time we went there. It was part of the old Malheur (Indian) Reservation. (R. 1196.)

After we had located there, it was surveyed by Neal in the winter of 1888 or 1889. Our land was in section 34, T. 24, R. 32, and you go on to the next township, south of us, in 25 T., R. 32 and the old meander line cuts off the southeast part of that, I would say probably three miles from the northeast corner of the township.

I did not happen to be right down there at the time Mr. Neal made his meander line survey, but I had been there before, and I have been there since, but I was not there when he was surveying.

Mr. BLACKMAR. Q. Now, in that township where he cut his survey off, was there any difference in the character of the land north of his line and south of his line?

A. Well, we owned land right on the meander line, and in haying time we mowed right across the meander line. We cut hay on both sides of the (Neal) meander line. And you could not tell until after the stakes were put in there, you could not tell to (R. 1197) where the other line was. You can now, of course, but until then you did not know where it was at.

Q. As I understand it, when you start out there with your mowing machine and start to cut your hay you can not tell the place where you cross the (Neal) meander line?

A. No.

It is mostly sugar grass there; there is some little wire grass and some salt grass that we cut there, but our big yield was sugar grass, a big part of the hay. The place that I am now speaking of is located in section 36, T. 25 R., R. 32 E., north of the lake.

I own the place in section 36, T. 25 S., R. 32 E., and the house where Dell Hayes lives now is situate right in the south portion of lot E, section 36, same township and range, north of the lake. (R. 1198.)

Mr. BLACKMAR. Q. For how many miles west of the Silvies River would you say that the land got its water out of the river?

A. Well, of course, the overflow comes out through the Ruh (place), through our place, and a portion of Doc. Graves—the Graves estate, but it does not go much farther than that. That is from the west fork of the Silvies River.

(NOTE.—Doc. Graves' place, his house, is in lot 3, section 35, T. 25 S., R. 32 E., north of the lake. R. 1199—Pecore.)

But I had reference to the land south of his (Doc. Graves') house, not land near his house. The land I have reference to was the A. F. B. George homestead that he had fenced, and I suppose he owns at the present time. I do not think around his home he gets water from the Silvies River, I would not say he didn't. The land was patented to Mr. George. (R. 1199.)

(NOTE.—The land patented to Mr. George is lots 1, 2, 7, 8, and 9, of section 2, and lots 1, 2, and 3 of section 1, T. 26 S., R. 32 E., north of the lake.—Pecore. R. 1200.)

Mr. BLACKMAR. Q. Now, east of the Silvies River for approximately what distance did the people up there get their water out of the Silvies River?

A. Well, you go east of the Silvies River and the water comes out from the company's field, the Red "S" Field, different fields there, into Lawen country, where it would be quite a distance there. That country is all pretty much irrigated from the east fork of the Silvies River. You go to—I suppose from our place you go north there 6 miles, north, and it runs out there and angles off toward the Saddle Butte country. It runs from a mile to 4 or 5 miles, running east and west, and probably 4 to 5 miles north and south there. That is the water from the lake, it comes in there, but it is principally overflow of the Silvies River which makes the Lawen country proper—the old country that was settled there in the early days.

Q. Now, in point of time, which land gets the water first; that is, which is watered by the Silvies River or that from the overflow of Malheur Lake?

A. Well, the river always before the lake raises, that is sure. That is, in our part of the country. (R. 1200.)

The first time I came to this country in April, 1887, I was around Windy Point. I freighted around there for a number of years after that around 1888, 1889, 1890, and 1891. I used to haul wood up to the Steen's Mountain every year for a number of years, when I didn't go around there with a freight outfit.

It was customary for us to water our stock there at Windy Point when there was water there. Now, in the summer of 1889, I stopped there; I had an eight-horse team, and wanted to water them; I went out for a mile or a mile and a half and finally found a little water in the holes and cow tracks and watered my horses. That was a mile and a half from the east border of Malheur Lake, by the east border of Malheur Lake, I mean the little bank along there. In 1887 we watered our horses right along by this little bank there when we came into the country here. (R. 1201.)

I have seen the water when it was at that bank, and I have seen it when there was no water to speak of between that bank and Pelican Island.

I have seen water in between Windy Point and Pelican Island. (R. 1202.)

I am familiar with the east and west fence line on the north side of the George Thompson place referred to by Mr. Bunyard in his testimony. (R. 1206.)

The year that Thompson, Vickers, Joe Clark, and Peterson owned that property, the old Thompson line from our northeast corner ran right on due east to the Showen place, or what used to be the Bob Arbor's place and the (Neal) meander line from the northeast corner of that land directly north of the Peterson place; my nephew, George Hill, deeded that land; on the Showen place there are only six or seven acres of deeded or patented land, the rest is also inside the meander line, and from the southwest corner of the northeast corner of the Hill place, the Neal meander line angles around that. There is about 97 acres of patented land on the George Hill place. It is between one-eighth and one-fourth of a mile from the northeast corner of our place to the (Neal) meander line. At the northeast corner of the Peterson place and the George Thompson place, and take it on the George Hill place, it extends or goes there almost half a mile. (R. 1207.)

Mr. BLACKMAR. Q. So that this fence he (Bunyard) referred to in some places was fully a half mile from the Neal meander line?

A. The northeast corner would be. It can not be quite a half mile, but right close to a half mile.

Q. In all your experience with the (Malheur) lake, have you ever seen any place on this lake where you could identify the Neal meander line with the vegetation?

A. Without these poles? (R. 1207.)

Q. Yes.

A. No, sir; no one could unless he was a surveyor.

Q. During this period, say from about 1895 to the present time, Hayes and Bennett and Cunningham, and all those fellows down in

the (Malheur) lake bed were farming their lands down there, and cutting hay?

A. From '95?

Q. From 1895.

A. Well, I have not been down in the country since '95. We got possession of that land—of course, I have hayed around the lake and ran stock around the lake, and am acquainted with conditions, but we have owned that land, that we own at the present time, we have had control of it since about 1906.

Q. 1906?

A. 1906.

Q. And you went in there before that?

A. Oh, yes; I have cut hay on the George place, and had that property leased before we bought this land.

Q. Then, of your own knowledge, you know for a period of 30 or 35 years that these people have lived in this lake bed and cut hay down there, and had their homes there?

A. I don't know whether you would call it lake bed or not. If you take it inside the (Neal) meander line, if that is termed the lake bed, of course we have haystacks all over the lake bed at the present time, and raised ground in the center of the lake and fenced out there, but we haven't been out there all (R. 1208) these years. Inside of our field I suppose there is around 500 acres of land. 173 acres is deeded, and the rest on that meander, and we have cut hay on that land, and there has never been a year since we leased or owned, we didn't cut hay; there have been a few years we didn't cut as much as other years, but we always welcome a good water year, and where there is lots of water and warm years we always get the big hay crop. Take good warm weather and plenty of water, unless it is extreme high water, those are the years we are glad to see.

Q. During the last few years, there have been quite a number of fences put in there below the Neal meander line, haven't there?

A. Well, we have extended our fencing south as the (Malheur) lake has receded there. (R. 1209.)

The people around there usually have done likewise. Doc. Graves, Hayes, Ausmus, and perhaps the Otleys moved their fences (out into the lake).

We sowed 47,000 pounds of oats this year down there, and we also sowed something like 65 acres of barley, and a couple of hundred acres of rye. That was all sowed on land south of my place that had never been cultivated before. We disked the land and plowed part of it and followed it up. I guess we had about a thousand acres altogether. We have obtained 12 or 14 stacks of grain there running from 40 to 50 tons to the stack, a little better than ten thousand bushels of combined grain down here. We used a combine to harvest the grain. It took 16 horses to pull it, good ones, and they were all grain fed. It cuts and threshes as it goes along and leaves it in four, five or half a dozen sacks in a place. I do not know the make of the

combine, but it belonged to a man by the name of Hawkins—it did good work. (R. 1210.)

Cross-examination:

We used the combine last year and I think that was the first time I ever knew of it being used. There was land where they used binders in that country down there; on part of this same land years ago people did.

I went around the east end of Malheur Lake when I first came to the country in April, 1887; the water was at that bank there at that time and I did not go around there again that year. I went around there again in 1888 and 1889, along in June. (R. 1211.) I was coming from the Steen's Mountain. That was that very dry year, and the year in which the water was approximately a mile and a half westerly of that bank there on the east side of Malheur Lake. (R. 1211–1212.) I would not say a mile and a half; it was a long, long ways out there, I would say that, and when we got out there, there was very little water even then. I was between the east side of the lake and Pelican Island. I do not remember just whereabouts I was at Pelican Island; evidently it was east of the Island.

I came back around there again in the spring of 1890, and the lake was pretty well filled up all along that bank, and there were low places out in the southeast end of Malheur Lake that the water was out in. That would be south and west of Windy Point; there is a low country that goes out there; and I do not know where the old Meldrum line is (R. 1212), nor do I know where the Neal line is, but it would be in the southeast corner of the lake there. There is a low country out there. At one time they started to drain this lake and (they did some) plowing out there, since I have been in the country.

When I testified about cutting hay at the old place on both sides of the (Neal) meander line, I was referring to the place that we own on the lake, in section 36, T. 25 S., R. 32 E. It is not the place up on the river where we located. We own land quite a ways north of the old Meldrum line (of 1877), and also some land south of it, but we do not own land on the old Meldrum meander line.

When I was referring to cutting hay on both sides of the meander line in the early days, I was referring to the Neal meander line (of 1895); and on both sides of the surveyed land and on the unsurveyed land. I think the first time we cut hay there was about 1906. I was not there until haying time. That is a low country and when the lake rises much in there, of course it rises up on that land a little, and the overflow from the river runs out that way too. I can not say whether the backwater of the lake stopped and caused the flow of the river to stop—back up together in 1906. We were in there at haying time, and the water was all gone. You do not stay around that land in the spring of the year. At that particular place, I do not know what the condition was with reference to the backwater of the lake.

Mr. LILJEQVIST. Q. Well, was it wetter down below the (Neal) meander, more tules and things of that kind?

*A. We have gone out of that ranch. We finally purchased that land in later years. You could follow out to the lake if (R. 1214) you went out far. I think the last few years, some years closer, and some years farther out. There was always a lake there.

Q. Mr. Hayes, at this place in these subsequent years after 1906, in the springtime, when the lake backed up and filled up, did the water come to the Neal line where you have your deeded land?

A. From the lake?

Q. Yes.

A. I think there were years that it did come up to the (Neal) meander line. Anybody knows in this lake there is no two years alike. Some years that run off of the waters is lots larger than others.

Q. I know. How far did it go at the extreme years after 1906 below the (Neal) meander line at the high-water mark?

A. How far would the water recede back from the (Neal) meander line?

Q. At the high-water mark. At the high-water period in the lake at any time after 1906 until the last couple of years?

A. In our field there always was around 500 acres of land.

Q. In your surveyed field?

A. In the field, the land inside of our enclosure, there is 170 odd acres of the deeded land, patented land, and the rest is land we had in our possession there, and ordinarily we cut all that field. There has been a few years right in the center of the ranch like there is a low country in there, and (R. 1215) some years we could not cut that out, and it never afforded much hay anyhow, but ordinarily back on the south part and north part we cut the biggest part and pasture it. (R. 1216.)

The part that we got a crop on, in the springtime it was irrigated from the lake and from the Silvies River both. Water came from the Silvies River and came down to the east side of the range and place there.

Mr. LILJEQVIST. Q. That land in there really has to be flooded to give you any real hay crop, doesn't it?

A. Yes; not necessarily from the lake at all, but any.

Q. Any water at all?

A. Yes.

The nature of the soil is such that you do not get much of a crop from subirrigation. You have to get flood waters either from the river or from the lake. Prior to the last three years, we have always cut some, or more or less wild hay there. The last stack of wild hay we cut there was about three years ago. (R. 1216.)

Mr. LILJEQVIST. Q. What caused that hay to grow? What waters? That is what I want to try and get.

A. You take it on the extreme south, the land laid along the (Malheur) lake there, and, of course, that low country, it would naturally come up there in the spring of the year and recede and go back. Take it on the north, the most northerly from the range, and

the water from the Silvies River would come out there and irrigate it, but the water would overflow; the water from the river would go all over the land.

The water did not come to the normal level on the north part of the ranch. I referred to the deeded or patented land. With reference to the (Neal) meander line between my patented land and the unsurveyed part, I have seen the water close to the (Neal) meander line at different times; there must have been times it was over the meander line, but sometimes it would be out there quite a ways from it. (R. 1217–1218.)

Mr. LILJEQVIST. Q. Have you ever claimed any water rights on this patented land there by reason of the backwater of the lake?

A. No, sir.

Mr. BLACKMAR. I don't know whether in this case it is right to attempt to commit these witnesses as to any water rights. I assume if any of these gentlemen have any water rights down there that they will want to assert them sometime——

SPECIAL MASTER. They will have to see lawyers about that. It might be perfectly legitimate for Mr. Liljeqvist to ask the witness if he ever made a claim. If he has made a claim to the back waters of the lake that would indicate that the backing up of the water from the lake did him some good.

Mr. BLACKMAR. I merely wanted to suggest that I would not want any witness, by reason of anything that he says here, to lose any right.

Mr. LILJEQVIST. I want the facts, and if the witness does not claim any water rights by reason of the backing up of the lake, I want to know it.

SPECIAL MASTER. Yes; he might say he didn't claim, or he might say that he did claim, or he might say that he did not know whether he would claim or not, and he would have to see a lawyer before he would answer that question. But if he has a state of mind that he makes no claim, you are entitled to know, or on the other hand, if he does make a claim or has (R. 1219) made a claim, that is in line with your cross-examination, and the question is, if you ever made a claim in respect to any of this property to water rights resulting from the backing up of the waters of the lake?

A. I haven't; no, sir.

SPECIAL MASTER. And have you in mind now that you have or may have rights resulting from that backing of the lake, or that you may or will in the future make such a claim?

A. Well, if I was going to be deprived of my water, I would certainly put in a claim for it.

SPECIAL MASTER. Yes.

Mr. LILJEQVIST. Let me put it this way: In this whole country there has been a fight on for water for years, hasn't there?

A. Yes.

Q. Now, are you claiming any beneficial use on this unsurveyed land by the backing up of the water of the lake?

A. Well, we have never—we have never gone to court. On the adjudication of the water we make no claim.

Q. There has never been any adjudication with reference to the unsurveyed meander line inside of Malheur Lake.

A. If they were going to adjudicate the water of Malheur Lake and we continued to own this land, I imagine we will be there scrapping for this water; I imagine.

The (Neal) meander line is north of the Thompson place, a little west. (R. 1220.) The Thompson land is right close to the (Silvies) river. The river runs close to the Showen house, and approximately at the Showen house the river forks out and the water goes in all directions.

At the Thompson place at extreme high water the water would back up there I should imagine from the lake up the river and spread out, but the water comes from the river there too. Feeding usually is done there some time in the latter part of March or April, and it is very seldom that you are there to watch this water, just exactly how it overflows and where it comes from. I would not undertake to say that the water of the lake backs up on to that seven acres at the Showen place or right to the edge of it. It is right on the (Silvies) river. There is a channel that runs from the Showen place down into the lake, and I am sure the water of the lake backed up into that channel to the Showen place. (R. 1221.)

Mr. LILJEQVIST. Q. Let me ask you this question: Has the Government promised you that you will get a homestead out of this unsurveyed land?

A. No, sir; they never. I have talked to Mr. Collins about this, but he never made no definite promise about anything. He simply told me to get on the stand and tell what I know about it. If that benefited the State, well and good, and if it helped the United States, all right.

Q. But they haven't promised any of you people inside the (R. 1224) lake any homestead rights on the lake or to perfect them?

A. No; nothing more than what the State promised me, and they haven't promised me that much.

Q. All the State promised you has been written in the law?

A. Yes; that is perfectly all right; I am not kicking about that.

Q. The Government has not promised you anything unless they wrote it in the law?

A. I have more promises from the State than the Government.

Q. And that is written into the law?

A. Yes.

Q. Are you attempting to tell us that the ordinary high water of the normal years did not come to the Neal meander line along the north side of that (Malheur) lake?

A. Now, Mr. Liljeqvist, that would be a hard question to answer. What would be a normal year with all this water? I have seen water come up to the meander line and come across the meander

line, but ordinarily this meander line—I have seen the water around that line, I believe, oftener than any other place, and other years I have seen it away out from the line.

Q. In the dry part of the year?

A. No; during the haying season. The way we handle this lake ranch down there, we usually go down in haying time and get the hay and stack it, and we are not there until feeding time, and time to turn in the cattle, and we go down and turn (R. 1225) in the cattle, and when it comes time to feed the hay out, we put a man there and feed out the hay, and in the latter part of March or first of April, we take him out, and he is not there maybe any more until haying time.

The reason I am not in there is because you have to protect your stock, and get it off there during the season the hay is gone. In our experience, there were not many years the farmers could not get hay below the meander line.

I have seen hay cut on the Charlie Peterson place; they usually hay right alongside of me, right at the same time; when we would be haying, also they would be haying. (R. 1226.)

Mr. LILJEQVIST. Q. A little water went in northerly of the Neal meander line on your place and the salt grass is a little farther up?

A. It is not unusual to see water there; it would come from the Herman Ruh place and always came across the line. (R. 1230.)

Redirect examination:

A few of the buffalo bones were exposed. We discovered them when we were discing.

Mr. BLACKMAR. Q. Do you know a buffalo skeleton from the skeleton of a steer or cow?

A. Well, I can tell you my experience with the first buffalo head I found down there (in Malheur Lake) this spring. I was out there and I talked to different parties about finding this head. My nephew found a whole bunch out there, and different parties came there, and my daughter-in-law and niece went out there and showed them, and they left their car there, and once in a while there would be a bone exposed here and there, and after they came back to the car, my niece was down there, and she touched the ground with her toe, and she said, "I believe there is something there," and he dug down and found a buffalo bull head. And my daughter felt something, and they took out three different more. When I found this head I was horseback, where the boys were working, and I got off and pulled it out where I could find it again, and went to the cabin, and my nephew and I went back and got it and put it in the car and was driving out of there—a few years ago, three or four years ago, I had some cattle down there, I put in some beef cattle, and I had lots of grasshoppers, and was putting out poison bran, and I imagine these cattle got that poison bran. Anyhow (R. 1234) with the outfit was a white-faced Hereford bull, thirteen or fourteen hundred pounds, and I got the head of the bull to compare the

buffalo and bull head together, and I have them home now. There is no comparison whatsoever.

Peat is usually to be found around a tule country. At the place where I dug out these buffalo heads, I saw what looked to me like wire grass, it had a brown color, and when I pulled the bones out, I pulled out quite a bunch of this grass by one of the heads, I did not see any decayed tules there. At that particular place when we started in to disc that ground in the spring, the ground was bare and had no grass on it at all; at that one particular time when I took out the bones, I found the wire grass. I have never discussed buffaloes with you (Mr. Blackmar); I never even met you; (R. 1235). I do not know Mr. Jessup, the Government engineer; I have no acquaintance with him. I met Mr. Pecore once since the trial started. (R. 1236.)

Recross-examination:

The buffalo heads that I found were on the extreme southeast part of the field we have fenced at the present time. (NOTE.—That is right down in here very close to where it is indicated on the map, Plaintiff's Exhibit No. 3, "Buffalo Skeletons."—Pecore. R. 1236.)

Mr. LILJEQVIST. That is around the deepest part of the lake. It never went dry there until this year.

A. There was water there this year when we started to farm until the wind blew north and south and finally wore it out. (R. 1236.)

Mr. LILJEQVIST. Q. Until this year, no time within the memory of man was that place (where the buffalo heads were discovered by the witness) uncovered by water?

A. Not to knowledge; no, I don't think so. (R. 1237.)

Mr. LILJEQVIST. Q. And you have given all the facts upon which you conclude that the buffalo died from lack of food, haven't you?

A. That is my opinion; yes, sir. (R. 1238.)

Mr. JESSE O. ALBERSON, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

In 1889, probably November, when I passed Windy Point there was a bank out from there about a mile or a mile and a half (toward Malheur Lake), and the water was out about a mile or a mile and a half from that bank. (R. 1275–1276.)

Mr. LILJEQVIST. Q. That is the driest year they ever had in this country except 1917, and the last two years, is that correct?

A. I believe so. (R. 1276.)

Redirect examination:

In November, 1888 or 1889 (R. 1279), I drove some bucks across Malheur Lake. I think we entered the lake on the east side of Saddle Butte (R. 1278), and we came out on the other side of the lake where there are a couple of buttes—maybe they call them Black Buttes—on the south side of the lake, maybe six miles east

of the Springer place. We had no difficulty in getting across; the lake was comparatively dry through there; there was no water at all where we went. We did not lose any of our bucks in going across there. (R. 1279.)

Recross-examination:

When I went across the lake there with those bucks in November, 1889, I started in southeast of Saddle Butte, or east of Pelican Island, and went straight across to the Black Buttes. I went across the eastern part of Malheur Lake, and east of Pelican Island. We were about two miles westerly of that old bank on the east side of Malheur Lake. There was no water between that bank and Pelican Island that year, in November, 1889.

Mr. LILJEQVIST. Q. That was the end of the driest cycle you ever had in that country?

A. Supposed to be; yes.

At that time it was entirely dry between Pelican Island and the east bank of Malheur Lake. I saw it again the following spring and it was filled up (R. 1280), and the water came up to the bank at Windy Point. It came up to that bank a good many years after that. I think that bank was substantially the eastern bank of Malheur Lake, as far as I ever saw the lake out there.

Mr. LILJEQVIST. Q. Was that the place it came ordinarily in the high-water stages in that lake in those early days?

A. Yes. (R. 1281.)

Mr. EDWARD ANDERSON, called as a witness for the plaintiff, testified in substance as follows:

When we first came to the valley in 1888, we wintered over east of the Spring Branch, and in 1889 we moved across west of the Spring Branch to what is known as the Myrtle Haines place. We lived there until 1893. Then we moved down that year, 1893, and put up hay on the Charlie Reed place.

(NOTE.—Charlie Reed's house is located in the northeast quarter of the southwest quarter of section 28, and his fences extend from the west boundary of lot 2 of section 28 north about 200 yards, and east a half mile, and south a half mile from the meander line, and that section is in T. 26, R. 31 E., south of the lake.—Pecore. R. 1282.)

THE WITNESS. My dad and I cut hay something like a quarter of a mile north of Charlie Reed's house. (R. 1282–1283.)

I could not see other people cutting hay out beyond there at that time, but since then I have. There was quite a bit of hay cut out north of the Reed place after about 1901.

Mr. BLACKMAR. Q. Have you ever cut any hay out around there in any of those places?

A. After 1901 I cut hay out there.

Q. Where did you cut hay?

A. On the Reed place.

Q. Did you cut any hay at any other places than the Reed place?

A. Oh, yes; several different places they cut hay.

I have been out in different parts of that (Malheur) lake, I used to hunt quite a bit there in the spring of the year (R. 1283), north and east of the Reed place.

I do not remember the George Thompson or the Tudor place. I am not acquainted in that neighborhood.

I do not know much about the Vickers place. I have crossed Malheur Lake with cattle in the fall of the year. One time I went to Lawen and got a bunch of cattle and came back with them across Malheur Lake. I crossed through the Haley place, west of Red Campbell's place, and came out on the south side of the lake along about the Reinemann place. (R. 1284.) In a straight line I think the Reinemann place would be about two and a half miles from the Sodhouse. That was along about 1906 or 1907 when I made that trip. I never did cross with cattle from the Red "S" Field.

I generally went afoot when I went on the hunting expeditions, and the biggest part of the time I would go out there about a mile, or a little over, north of the Charlie Reed place. (R. 1285.)

Mr. WILLIAM HANLEY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I was around Windy Point during a part of February and probably some in March, of the year when the Sand Reef broke through (1881), but just a little later in that same month of March, I went back to southern Oregon and helped gather another bunch of cattle and bring them out.

Mr. LILJEQVIST. Q. You don't know whether the water got around Windy Point, away south of it, that high water, or not?

A. I will say it didn't; and I will take chances with the balance of the witnesses.

Q. Your judgment is that it was probably half a mile west of it?

A. Yes. (R. 1392.)

Mr. MARION HORTON, called as a witness for the plaintiff on cross-examination, testified in substance as follows:

I first became familiar with Malheur Lake in 1885.

Mr. LILJEQVIST. Q. What is your judgment as to all those years, for a good many years, of it being about the same, as far as the waters of the lake are concerned, I mean?

A. They were about the same, I guess, for a number of years.

Q. The reason that I am asking that is this: You are asked (by counsel for the Government when you gave to them a statement) if you went out in a boat in Malheur, and you said, "I did in (R. 1472) early days," and the question is, was that during an ordinary year or an exceptional year, and you said, "I hardly know how to answer that; it would be an ordinary year, because pretty nearly all those years were about the same until it started to get dry." Is that your judgment?

A. Yes.

Q. In these statements (that you gave to counsel for the Government before the trial), when did you mean it started to get dry, according to your recollection?

A. 1914, I should judge. (R. 1473.)

Mr. JOHN EDWARD LOGGAN, called as a witness for the plaintiff, testified in substance as follows:

I think the first time I was down in that country (Malheur Lake) was in 1887 or 1888. I worked down there in a hay field when I was a lad, for a man by the name of Tom Bane; he did not own the land, however. I think that land was back of the (Neal) meander line before it was surveyed; I would not be sure of it; it was the first settlers who went in the Lawen section. I imagine that land would be about a mile and a half from the old post office at Lawen; and (R. 1475) it has been moved since.

I never did work for any of those settlers down there who lived in the west end of Malheur Lake below (Neal) the meander line. (R. 1476.)

Mr. ORIN EUGENE THOMPSON, called as a witness for the plaintiff, testified in substance as follows:

I knew a man by the name of Jim Mahon. He had a place along the edge of the (Malheur) Lake, probably 2½ miles north of Windy Point, that we speak of. I could not say positively whether it is or is not within the Bird Reserve—there was only part of it in the Bird Reserve; I could not say as to that. It lay along the edge of the lake, along this bank, I think he had patented lands; it was patented to Jim Mahon. (R. 1509.)

(Mr. PECORE. There is some land patented to Lucy Mahon.) (R. 1510.)

The WITNESS. That is probably his wife.

(NOTE.—That is in the northeast quarter of the northeast quarter, and lots 9 and 10, section 18, lots 1, 2, 4, 5, 7, and 8, and the southwest quarter of the southwest quarter of section 27, and lots 1, 12, and 13, in section 34, T. 25 S., R. 33 E.—Pecore. R. 1510.)

The WITNESS. I am acquainted with a man by the name of John Haines; he came to visit me in the spring, or summer, of 1888; I could not say exactly the date, but it was sometime in the forepart of the summer. We walked from the edge of the (Malheur) Lake across to Pelican Island. (R. 1510.) We did not start in about Windy Point; we started in about the Jim Mahon place, somewhere along the Jim Mahon ranch, and we walked across to Pelican Island. (R. 1511.)

(NOTE.—The Jim Mahon place is in the northeast quarter of the northeast quarter, and lots 9 and 10, section 18, lots 1, 2, 4, 5, 7, and 8, and the southwest quarter of the southwest quarter of section 27, and lots 1, 12, and 13 in section 34, T. 25 S., R. 33 E.—Pecore. R. 1510.)

Cross-examination:

That was in 1888; the (Malheur) lake was dry at that time.

I was not out there in 1889.

I walked from the Mahon place on dry land to Pelican Island. The Mahon place is the place I have described.

I have been along there different times since then, but not that year (1888).

I think the water came back in the spring of the following year.

Mr. LILJEQVIST. Q. Hadn't the water been back over that area between Windy Point and the east side of the lake and Pelican Island a great many years? (R. 1511.)

A. It has been back, and went back, and has been dry.

I do not think there has been any water that has reached Pelican Island for the last three or four years; prior to that time, at different times, there has been water between Pelican Island and the east bank of the lake. (R. 1512.)

I have been on it (Jim Mahon's place) at different times traveling back and forth over the road; the road ran right through.

Mr. LILJEQVIST. Q. Where did the lake come with reference to his water line, the water side of the lake on his land?

A. Well, it would be along on the west side.

Sometimes when the wind would blow, it would blow the water out on to his land a little, and that is about all the benefit he got on his land by the back water of the (Malheur) lake. (R. 1513–1514.)

I am not right positive as to how the water was there in 1895, but I think it was rather dry.

Mr. LILJEQVIST. Q. Are you saying that the water was or was not—that is, the Neal meander line at that place was or was not the approximate border of the lake in '95, and years before and after?

A. I could not say.

Q. You know deeded lands have had some benefits from the waters of the lake, whether blown over it or they rose over it?

A. Sometimes it did.

Q. Some years it got high enough so it didn't have to blow over, but rose over onto deeded land?

A. Over on a part of it.

There is only one year that I remember him (Jim Mahon) cutting hay; he used it (Jim Mahon's place) mostly for pasture land.

Mr. LILJEQVIST. Q. Isn't it a fact the salt grass grew at the upper edge of the lake beyond the water line?

A. It generally grows along the water line; yes. (R. 1514.)

Mr. FRED HAINES, called as a witness for the plaintiff, testified in substance as follows:

I lived down in the Lawen neighborhood from 1887 to 1889, a couple of years.

When I lived down there, I tried to have a ranch. I went into the Red "S" Field and got kicked out with a lot of other fellows.

While I was in there, I did not raise any crops (R. 1518), but I had one little crop of hay in 1889. That was a very dry year, and it was a very small crop.

The water we got for that crop was just a little rain.

Since then, I have been down to the lakes from time to time, but not very often; I did not go down there oftener in the early days than I have in the recent years.

In 1889 I went into the mercantile business, and I stuck pretty close to it for about forty years. Of course, I was down there (in Malheur Lake) off and on. (R. 1519.)

I have done no freighting in the early days that took me by Windy Point; I have passed there, but not frequently; in just a few different years and just a few different seasons of the year.

I have never seen the lake up over that road at Windy Point at any time that I passed there. (R. 1521.)

(No cross-examination.)

Mr. JAMES J. DONEGAN, called as a witness for the plaintiff, testified in substance as follows:

I have lived in Harney County since 1889 and continuously since 1893. I first came here in 1889 and at that time I went to work for Colonel William Hanley. He had the property now known as the Bell A Ranch, near Burns.

SPECIAL MASTER. How do you spell that "Bell"? Is it a lady or a noise maker?

A. Judge, the names of the pioneer ranches is taken from the brand, and his brand was an "A" in the shape of a bell. That is usually the origin of the names of the pioneer ranches.

The names given to the Red "S" Field is due to the fact that that section of the so-called Island Ranch, were swamp lands and were designated by the red letter "S," and on plats where they show a red "S," it (R. 1529) refers to the fact that that was swamp land.

I worked for Mr. Hanley as a cow boy, rangoo boy, in those days; it was the young fellow who had charge of the saddle horses in the round-up, and doing general work. In 1889 I helped drive. Just at that time, I had an occasion to help a gentleman who lived in Happy Valley by the name of Drake. I drove a bunch of cattle from the Bell A ranch across the east side of Malheur Lake to Happy Valley. We stayed north of Saddle Butte and stayed on the old Happy Valley road that ran near Windy Point. We did not come through the lake there, we were on the road.

I can not recall whether we watered that herd (R. 1530) at Windy Point; I am not sure as to that.

In later years, I had occasion in an official capacity to go into the (Malheur) lake. (R. 1530–1531.) I was county assessor in this county from 1908 till 1916. In the year 1909 I reclassified all the lands in Harney County and among those lands, private lands around the entire Malheur Lake. My duty as assessor also required me to list personal property.

With reference to people who lived down there below the (Neal) meander line, I knew Mr. Red Campbell and Mr. Jason Bennett, and I think I knew the others who lived in there below the (Neal) meander line; I can not recall their names, but I remember those two gentlemen, and others whose names I can not recall. Their cattle and other personal property was assessed.

Mr. BLACKMAR. Q. You, as county assessor, felt that they did not have very much title to that land down there, and for that reason you didn't include it on the tax roll?

A. Naturally, no; unless it was patented land under the (R. 1531) laws of our State; however, the statutes of our State provided for the assessment of lands not deeded, but as a matter of public policy I didn't assess those only at a nominal value.

I assessed anything that I thought we could get money out of. (R. 1532.)

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, testified in substance as follows:

The first time I hunted down in Malheur Lake was in the latter days of September in 1886; at that time I did not have a boat; we went around with a buggy, and we shot all around, all over in both lakes, clear from the west end of Harney to the east end of Malheur Lake. I have spent several days down there, as much as a week at a time, hunting.

Since 1886 I have hunted down there every year until the last two or three years, but I have not hunted there very much since this dry period. (R. 1647.)

I remember having crossed the (Malheur) lake in a buggy, between the Red "S" Field and the Sodhouse. (R. 1654.) I think 1889 was the first time I went through the (Malheur) lake there in a buggy. At that time there was a well defined road or wagon track through it. The wagon tracks broke out through the tules. I came in from the south side. There were with me at that time Judge Morgan D. Clifford, of Baker City, Oregon, who was the circuit judge at that time; a man named Gowan, and a man named Cozad, who resides here in town (Burns, Oregon).

We came through there and struck no water coming through. We came out east of the Sodhouse Springs, and came across north; when we came south of the Red "S" Field, Simon Lewis lived there, and we came out of his place and struck some water there, a slough we had to come through there. (R. 1655.)

Cross-examination:

I hardly think we have had a year like 1889, until just the last couple of years. (R. 1655.)

In 1886 there was a little—pretty well defined bank (out) from Windy Point, I think about a mile from the point, and there were two roads going to the south, and one bore off to the northwest coming from the south, there just beyond Windy Point; there was a well

dug in there afterwards, and the other one (road) came north towards Crane. The water with reference to that bank (in 1886) was right up at that bank when I first saw it; right along the little banks. There was water up there. The road goes to these banks after you get to the northwest of Windy Point, and before you get to Saddle Butte. They run fairly close, that is fifty or sixty yards, to some of the little banks.

South of Windy Point was high, dry sagebrush land.

Mr. LILJEQVIST. Q. Did you go into Springer's Spring that trip?

A. Oh, I have been—these particular trips I came from the south, I have been around Springer's, clear around that lake lots of times.

Q. You have told the driest time you saw it in 1889. What was the wettest you saw it? How did it look then? (R. 1656.)

A. In the spring of 1888 I have seen it awfully wet; I have seen lots of water at different times in those lakes; a lot of water.

I would not say when it (Malheur Lake) started to dry up; that lake has been dry several times, not altogether, but the water has been very low. I guess it was never in my time as low as it is now.

I do not think the water ever got to Voltage; I don't remember of it ever getting there. (R. 1657.)

Mr. LILJEQVIST. Did you give a statement to Mr. Collins?

A. I think I did; yes, sir.

Mr. LILJEQVIST. I have a carbon copy the Government furnished me, which purports to be signed.

Q. Weren't you asked this question:

(By Mr. Collins when you gave that statement.)

"Q. In the high-water season in the ordinary year, now, eliminating exceedingly wet or dry years, what would be the condition of the water? The stand of water in the lake and around the lake area?"

And your answer: "I couldn't say that, because it is a big country. The whole country seems flooded. I have seen the country flooded and dry—not so dry as now, but awfully dry. Malheur, from Voltage north across through there the tules would be 10 or 12 feet high. We used to drive through there in the fall. The channel between the two lakes—in 1886 when I was first there, it was a well defined channel 15 or (R. 1659) 20 feet deep in that channel. The water in the evening and afternoon would flow west into Harney Lake, and in the morning it would flow back the other way, the trash and stuff."

A. I was about to say back of Voltage; I didn't say that, because the tules never came out to Voltage.

Q. They misinterpreted your answer. Is that your recollection, the way you answered there?

A. I don't think I answered that way as to the tules coming out to Voltage; that was not the case.

Q. The channels between the lakes, did you say were 15 or 20 feet deep?

A. Yes; I have seen that channel (between Malheur and Harney Lakes) when it was awfully deep. (R. 1660.)

Mr. GEORGE MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

I cut hay that year (1895) on my place.

(NOTE.—The George Marshall place is located in lots 9 and 10, the west half of the northwest quarter and the southeast quarter of the northwest quarter, section 36, T. 26 S., R. 31 E., south of the lake. That was the land that was patented to him.—Pecore. R. 1689.)

The WITNESS. I always cut hay on my own place; I cut hay below the (Neal) meander line, and stacked it there, and when Mr. Neal came through I had haystacks on both sides of that meander line; I had it stacked at my place, and inside of that (Neal) meander line; I had hay on both sides after it was surveyed. (R. 1690.)

The water I get on my place that makes the hay crop, comes from the Blitzen River. (R. 1690–1691.)

During the years that I lived on my place I went to Burns quite often. In going from my place to Burns I would come up by Charlie Haines' store and cross the bridge there and come over the mountain here at Burns.

Mr. BLACKMAR. Q. Did you ever cross the (Malheur) lake?

A. Yes.

I went across in the fall, September, October, and November, along those times. (R. 1692.)

I want to say a word. You spoke about crossing the lake. I never crossed the lake. I crossed those meadow lands from the Sodhouse. I crossed north. I never crossed that (Malheur) Lake by horseback only when it was froze over.

I started north at the Sodhouse, on the west side of the spring branch, and I went straight through there and came out on the other side about Adam George's old place, whenever I rode through there; that is a meadow across there.

Mr. BLACKMAR. Q. And not a lake?

A. No.

Mr. LILJEQVIST. I object to that as calling for a conclusion of the witness, and contrary to the decisions themselves.

A. I do not want it to appear I have crossed that lake horseback, because I didn't do it.

Some years we could cross that (part of the lake) earlier than others. In dry years you could cross there pretty early. Late years you could cross in October and November. (R. 1693.)

I remember the Vickers place. In crossing from the Sodhouse to the Adam George place we would go quite a little ways east of the Vickers house; I do not know how far; I think it would be more than a mile. I very often crossed in there about the Vickers place. Very often drove cattle in through there.

Mr. BLACKMAR. Q. But this other route, when you were going to Burns, that you took, you think that that was at least a mile east of the Vickers house?

A. Well, I know that I could cross through there a mile east of the Vickers house.

The Adam George place now is away on east from where he (Mr. Blackmar) was speaking of. I did not go straight across there, but I came out at the Adam George place. I could not go straight through there, and I never did (R. 1694) do it.

I do not know anything about a pump house out there, unless it is an old oil well (Howell oil well). I do not know anything about the Doc. Graves pump house. He put that up within the last eight years, after I had left there.

Mr. BLACKMAR. Q. Did other people go the same way you did?

A. Some of them. Them people followed the same trail I did and drove cattle.

Q. It was a pretty well marked trail?

A. It was plain trails through there, toward that Vickers place. (R. 1695.)

Cross-examination:

The reason I did not go in a straight line from the west branch of the Blitzen to the Adam George place was because it was a little too muddy; I veered off to the west when it was too muddy; I was going north; the water was on the east, on the right side, and if it was a little too (R. 1695) muddy and uncomfortably muddy I would bear out farther around and come into Adam George's (place), if I wanted to go in there.

I went through there most every year I lived there, except two or three; I would go through that dry part of the country. The time of the year I went through there would be September, October, or November, along in those months. (R. 1696.)

The water of the Blitzen River has come up there to the north line of my place. (R. 1698–1699.)

When the Blitzen River quit flowing the lake did not fill up; the lake generally went dry when the Blitzen River did. The Blitzen River quits flowing after the snow goes off in the spring—after the high waters, when it gets warm enough to thaw. The Blitzen River generally quits flowing along in the summer.

I think the (Malheur) lake starts to go down before the Blitzen River quits flowing.

Mr. LILJEQVIST. Q. Now, are you telling us you never saw the water of the Blitzen—of the lake back up around your north line?

A. No, sir; and it never backed up there, either.

Q. You never did?

A. No, sir; and it never backed up there either.

Mr. Benson has got a place there over the (Neal meander) line, but I don't know just where his place is.

Mr. LILJEQVIST. Q. Now, isn't it a matter of fact that the water of the lake has backed out year after year except until the last recent dry period in front of your land?

A. No; the river runs down there and fills it up. (R. 1700.)

Q. Yes; I know it does. I am talking about the lake. Can you answer that? Isn't it a matter of fact that line is a foot lower all around your north line than the meander of the lake?

A. I don't know whether it is or not.

Q. If it is a foot lower than the meander line of the lake, if the lake comes to the meander line, it certainly floods your lands, doesn't it?

A. The river flooded my land.

Q. I am talking about the lake. I know the river flooded your lands.

SPECIAL MASTER. Is there any question pending?

Mr. LILJEQVIST. Yes. But it is unanswered.

A. What is the question?

(Question read by the reporter.)

SPECIAL MASTER. The witness testified that the lake doesn't.

I have three brothers, Elven, Alfred, and John Marshall. I am the oldest one. We all had lands in that vicinity. Some of the land was surveyed and some of it was not. Elven Marshall lives at Voltage. Mrs. Mary Marshall was the wife of Alfred Marshall. (R. 1701–1702.)

I did not have any trouble with anybody in the early days with people squatting in front of me at my place.

I never tried to get the Government to extend the line of the survey north of my place. We got a petition and got a lot of that land surveyed by the Neal survey, but I never fooled with it any more after the Neal survey. (R. 1702.)

Recross-examination:

I did not cross Malheur Lake in the fall of 1914. (R. 1703.)

Mr. EMANUEL M. CLARK, called as a witness for the plaintiff, testified in substance as follows:

I know where the Government (Lake Malheur Bird) Reserve posts are (around Malheur Lake). They started to cut hay within those posts in July and August, but I don't think I could tell you the year when they commenced to do that. (R. 1736.)

SPECIAL MASTER. When were those Refuge Posts put in first?

Mr. BLACKMAR. What year was that?

Mr. JEWETT. At different times, along about 1912.

Mr. BLACKMAR. They have all been put in since 1912. (R. 1736.)

SPECIAL MASTER. You mean the area marked by those posts?

Mr. BLACKMAR. Yes.

(Record read by reporter.)

Mr. BLACKMAR. That is, I mean inside the territory which is now marked with the posts.

I first saw haystacks down here on the (Malheur) lake, inside of the reserve posts in 1892. (R. 1737.)

There was hay put up on the Island Ranch when I first came here (in 1883); that is, down toward the lake.

I remember an occasion in 1889 when I took some cattle from the Sodhouse to the Red "S" Field. I did not have very many head, just a few.

I drove them from the Sodhouse across to the Red "S" Field; there were three of us, Jim (Billy—R. 1738) Brandon, a young fellow by the name of Trisch, and myself. We went over there to gather the cattle. They were a ranch (brand) cattle that belonged to the Island Ranch. We went over by the Narrows, that is the first time I ever crossed the bridge, and when we came back, we came back from (R. 1737) the Sodhouse across the (Malheur) lake to the Red "S" Field. It wasn't a lake; I would call it a marsh.

That is not the only time I have driven cattle between the Red "S" Field and the Sodhouse. I have driven cattle across it since that time.

I have never had any difficulty on account of getting stuck in the mud with them across there. The way we went there was not a well-defined trail across there. It was tules. We just came on through tules with our cattle, and once in a while we would strike a place where there might be a hole of water in a low place, and we would go out around it. (R. 1738.)

Cross-examination:

I first saw Malheur Lake in 1883.

In those days I think the water must have been a mile from Windy Point; maybe a little farther, I would not say. The water came up there for three years. (R. 1740.) By that I mean it just stayed about where it was (for three years).

SPECIAL MASTER. How far was that from Windy Point?

A. Well, it must have been a mile; maybe a mile and a half, I don't know, I am not sure about the distance.

In later years the water began to go down. It has come back since that time in 1894; there was high water; the open water stayed there for several years.

Mr. LILJEQVIST. Q. Now, were you able to cross from the Sodhouse to where you stated the following year after 1889?

A. Yes.

Q. In the fall or in the spring time?

A. In the fall.

There was one exception I mentioned about going over there in the winter with those cattle; that was in February we crossed.

The time that I talked about crossing (R. 1741) was in February, but I have crossed there in the summer time since, of late years.

I think I crossed in 1888.

The first year I saw Malheur Lake was in 1883. 1888 was a dry year, too.

When I crossed there (in 1888) there were several others together (with me). 1887, 1888, and 1889 were increasingly dry years. Some years there wasn't as much water as there was other years.

Mr. LILJEQVIST. Q. In recent years have they taken a lot of water out on sagebrush land of the Blitzen?

A. Yes. (R. 1742.)

Q. As a matter of fact, since you have been in the country there has been a vast amount of water that never gets to that lake at all on account of irrigation, isn't that correct?

A. I think irrigation has something to do with it. This year no water came down on the sagebrush land. (R. 1743.)

Mr. GEORGE WASHINGTON SIMMONS, called as a witness for the plaintiff, testified in substance as follows:

I have had plenty of occasions to go onto the (Malheur) lake, but I never was on the (Malheur) lake much, only when it was froze up; something like that.

During the winter months when I was a comparatively young man I worked cattle down in there.

I never did any hunting there, never did any shooting to speak of. I left down there (Malheur Lake) in 1913. (R. 1748.)

When I was living there on my place we got the water from both the Blitzen River and from the back-up of the lake.

Mr. BLACKMAR. Q. During the time that you were living down there, I suppose in the different years that you lived there the water came to a different level, did it not?

A. Yes; it was never the same hardly any two years. It varied.

I have seen the water above and below the Neal meander line.

Our family always cut hay (R. 1750) below the Neal meander line, and the hay above and below the line was practically the same kind of stuff. (R. 1750-1751.)

Since I have lived down there my family has been able to cut some hay every year except one year. There was one year they didn't cut any hay at all, because it was too wet. That was along in 1894, I can not remember exactly.

Cross-examination:

That is the same year that I saw the water to the level of the bridge at the Narrows. (R. 1751.)

Mr. MAURICE FITZGERALD, called as a witness for the plaintiff, testified in substance as follows:

There was a very great freshet in the country in the spring of 1881, I think in March, 1881, the highest I have ever seen or known in Harney Valley. The (Malheur) lake raised up considerably almost to the top of that bank (at the east end of Malheur Lake near Windy Point), and in one place it even crossed the road where I was carrying the mail.

Mr. BLACKMAR. Q. This little place you referred to where it was over the road, was that as high as the rest of the road?

A. No; it was lower than the other places. A little sag, it might be called, in the road, but the lake waters crossed that road. That was the only time I have ever known the waters of the lake to cross the road. That was the main traveled road to Happy Valley, Diamond Valley, and Anderson Valley, and all that country at the time. (R. 1788.)

Cross-examination:

Mr. LILJEQVIST. Q. Where did you cross Malheur Lake in June '81? (R. 1803.)

A. At a place—well, there was a crossing. We crossed several places. I don't know how I can describe it here unless I had the section.

It was about 2½ miles from the lake.

At times the horses would swim a little, in the spring of the year. (R. 1804.)

Mr. JOHN R. JENKINS, called as a witness for the plaintiff, testified in substance as follows:

I have been around the western part of Malheur Lake, around the Red Campbell place and the Haley place on the outside. I know where all those old settlers lived there when they took up and first settled in there.

The first time I was through the Narrows there, I think in 1886, those settlers were cutting hay there then, and those settlers have cut hay every year since then; I do not know about this year, as I have not been down that way. (R. 1815.)

Cross-examination:

Some of those persons I saw cutting hay down there along the westerly side of the (Malheur) lake moved out in the spring, and some of them did not.

The first settler at the upper end of the grade, where the road went out to hit the salt grass, was Mr. Henderson Elliott (whose place was on the edge of the lake, on patented land); he used to move out and then stay off and on; he used to have a place up in the hills. The next place north of that was a Mr. McKenzie who is now dead. He stayed in there the biggest part of the year, I have an idea, but he had another place up in the hills. I think he would go out in the latter part of the year. He had a place on what they called Weaver Spring (R. 1817) where he was the wetter part of the year. (R. 1818.)

Mr. EDMUND J. MARTIN, called as a witness for the plaintiff, testified in substance as follows:

Those (greasewood) stumps that I could observe and see were due east of Pelican Island; over towards Windy Point. The water was shallow in there (east of Pelican Island, towards Windy Point); I could see those stumps (of greasewood), they were not floating.

They were standing just like they grew there, in the mud, in the bottom of the (Malheur) lake. (R. 1918.)

Cross-examination:

I guess they (the greasewood stumps) were in the mud. They were at the bottom of the lake. There was water over the mud.

Mr. LILJEQVIST. Q. You were camped here on the peninsula? (R. 1919.)

A. Yes; we were camped on the peninsula, on this peninsula, and while there I started out, and the wind was coming this way [witness indicating].

Q. Coming from the west?

A. Yes; and blowing water clear around back of the lake, around this side [indicating].

Q. The wind blew it around the lake?

A. Yes. There was a low place through there where the wind came, and it would drive it right around.

Q. The wind blew the water through a low point at the north of the peninsula?

A. Yes; north? Yes; north, that is right. (R. 1920.)

Mr. ALVA SPRINGER, called as a witness for the plaintiff, testified in substance as follows:

The water I receive on my property comes from the Blitzen River; that has been true ever since I have lived there; I get more water there some years than others (R. 2016); but that is the only way I have of getting water on my place, is through the Blitzen River.

I did not get any water that is backed up from Malheur Lake on my place; I have never got any water from there.

Some of my neighbors on the east of me also get their water from the Blitzen River.

The place right east of me is Mr. Kado's ranch; the Blitzen River runs right through his place, and he gets water out of there to irrigate. If you follow right down that river you strike the (Lake Malheur) Bird Reserve, adjoining his (Kado) place.

The people who live on the west side of me get water from the Blitzen River. Mr. Dunn lives immediately west of me; west of Mr. Dunn another Mr. Dunn lives; then there is a Mr. Reed; then there is Mrs. Caldwell; then there is the Reinemann place. (R. 2018.) Those people get water from the Blitzen River. (R. 2017.)

I do not think that any of those people get any back water from Malheur Lake; I think all of their water comes out of the Blitzen River.

I have seen Malheur Lake since 1888, and all the different years down to date; I have seen it all the different seasons (of the year). As the years and seasons have come and gone since I have lived

there I have seen Malheur Lake at various different stages and different years and different seasons.

Mr. BLACKMAR. Q. I will ask you to state whether or not since you have lived there if the water comes to the same level every year?

A. No, sir.

Q. Does it change from year to year?

A. Yes.

Q. And from season to season?

A. Yes.

Q. Have you ever seen it the same in any two years in succession?

A. I don't remember of it.

Q. From the high point that you have seen on the (Malheur) lake since you were there in 1888 to the low point which you have seen at any season, how much difference would you say there is between (R. 2018) the high point and the low point? You can state it in yards or miles.

A. Well, that would be a hard question for me to answer, for the simple reason I have seen quite a lot of water there at times, and at present there is not any water at all to speak of, but I could not answer your question very good.

Q. Well, it would be several miles, wouldn't it?

A. Yes, sir.

I think about as high a water as I have ever seen that I remember of down there, was sometime in the nineties; probably along about 1894.

Prior to 1900 I think 1889 was about the driest time I ever saw up to this time, the way I remember it. In 1889 the lake did not get as dry as it is at the present time.

Mr. BLACKMAR. Q. During the year '89 was it possible to cross the so-called (Malheur) lake bed in a wagon, or with stock, or on horseback?

A. North of where we lived?

Q. At any place?

A. Oh, you could go out across it; it was dry for years. In the fall of the year it was dry clear across. (R. 2019.)

Cross-examination:

Mr. John Marshall had a homestead perhaps somewhat north of my place.

Mr. LILJEQVIST. Q. Now, isn't it a fact that the water ordinarily in the spring backed up with quite a volume of water out there on John Marshall's north line?

A. I don't think so.

Q. You don't think so?

A. I don't remember it; when the (Blitzen) river was high there was lots of water in it.

Q. But you mean when the lake filled up it did not back up to John Marshall's land?

A. I don't think it did.

Q. Now, wasn't it up to that (Neal) meander line in 1919 when I was in there the first time?

A. The water, when the (Blitzen) river is high, gets on both sides of that meander line, through that country; it gets above it and below it, but it is mostly (Blitzen) river water.

I don't think the (Malheur) lake ever backed up there.

Mr. LILJEQVIST. Q. In 1922, when a party consisting of Mr. Staley and Mr. Jewett and Mr. Marr and Mr. Cupper, the State Engineer, was there, wasn't the water of the (Malheur) lake right up to the north line of John Marshall's place?

A. I could not say it was; there was lots of water there (R. 2032) at that time, but I think it was mostly (Blitzen) river water.

Q. It is a fact that the back water of the lake has gone past that Neal line around there a great many times, isn't that correct?

A. The back water from the lake?

Q. Yes.

A. I don't think so.

Q. What did you mean by this answer given to the Government (when they took a statement from you):

"The water has never reached the '77 meander line since the year '88. It has crossed that Neal meander line many times."

A. From the (Blitzen) river.

Q. What is that?

A. From the (Blitzen) river it has crossed the old meander line (of 1877).

Q. Weren't you talking about the lake itself?

A. No; I don't remember that.

The (Blitzen) river flows over the Meldrum line (of 1877) when there is water; any time there is water in the Blitzen River it overflows the Meldrum line (of 1877), and it also overflows the Neal meander line.

Mr. LILJEQVIST. Q. And when you made that answer weren't you talking about the lake?

A. What answer do you mean?

Q. I have a statement, a copy of a statement you made, and the statement says: "The water has never reached the 1877 meander line since the year 1888. It has—"

You were talking about the lake there, were you not? (R. 2033.)

A. Talking about the lake?

Q. You said: "It has crossed that Neal meander line many times."

A. From the (Blitzen) river it has crossed both of them meander lines, but I never saw the water backed up from the lake to the old meander—to the old Meldrum line. I think that is what I claimed in my statement.

Mr. Neal ran his line in the fall of the year (1895).

Mr. Benson's cabin is down next to or close to the (Malheur) lake.

Mr. LILJEQVIST. Q. How did it happen that you did not file on the lands that John Marshall filed on subsequently?

A. Well, I could not very well file on the whole country, on a homestead.

I filed on 160 acres. My homestead was 160 (acres), I think it was 161 and a fraction, but this John Marshall place did not lay directly north of my homestead. This place at the (Sodhouse or Springer's) Spring that lay south of the John Marshall place was my father's homestead. (R. 2034.) My homestead lay west of that.

(Final Certificate No. 807 was issued by the Government on January 26, 1903 to Alva Springer for lots 5 and 6, section 34; lots 7 and 8, and the southeast quarter of the northwest quarter of section 35, all in T. 26 S., R. 32 E., south of Malheur Lake.—Pecore.)

The WITNESS. My father's homestead was patented to him by the Government, and I bought it from him after he got the patent. There are 317 and a fraction acres, if I remember right, in the two places.

(Final certificate No. 809 was issued on January 29, 1903, to Louis B. Springer (Mr. Alva Springer's father) for the west half of the northeast quarter, and the southeast quarter of the northeast quarter, and lots 5 and 6, all in section 35, T. 26 S., R. 31 E., south of Malheur Lake.—Pecore.)

The WITNESS. My father's name was Louis B. Springer.

Mr. LILJEQVIST. Q. From your line, from the south—pardon me. From the northwest corner of your land that was your homestead, it is practically a half a mile to the lake, isn't it, to the Neal line?

A. Do you call the Neal line the lake?

Q. Yes, sir. (R. 2035.)

A. Yes; I think the Neal line cut off a little of the corner of what was known as Mrs. Marshall—S. E. Marshall place—laying directly north. It was practically a half a mile; yes.

From the center of my homestead, due north, it was something like five-eighths of a mile to the (Malheur) lake. (R. 2035–2036.) That (the Neal meander line) was a crooked line running through there, and it wasn't all the same distance every place you went across. (R. 2036.)

Mr. LILJEQVIST. Q. Now, Mr. Springer, you are absolutely confident that you (R. 2042) have never seen the (Malheur) lake back up into the (Springer) Spring?

A. No, sir; never have. I never saw it but what there was a current in that channel.

The water of the (Malheur) lake did not back the current up there and still it there; it was a sluggish stream. The water—it is not like a mountain stream, where the water comes down with a rush; it is rather a sluggish stream, always was; I never saw it when there wasn't a current there. (R. 2043.)

I knew nothing about the conditions there prior to 1888; I never said 1887, I was not in there in 1887; in June, 1888, was the first time I ever saw that country. (R. 2044.)

Mr. LILJEQVIST. Q. Mr. Springer, I want you to tell the Court what you know about the spring run-off for the many years when you first

went into the country? Was there a difference in the run-off? In other words, was there a run-off from the lower hills, the lower part of the country, before the mountain (R. 2052) run-off came?

A. Yes.

The first break-up generally came in February; sometimes it would be in January, but (with) the first break-up we would have high water, which came from the foothills, the low hills, and the valleys; the last of May or the first of June we would have another high water off of the high hills, but we haven't been getting the first high water here of late years, there hasn't been any.

Mr. LILJEQVIST. Q. That is what I want to get. That is a fact known to all of you people who were in there from the earlier days; isn't that correct?

A. Yes.

We haven't had any real high water in this first run-off for several years; I think the highest water I have seen in that (Blitzen) river was in an early run, years ago; that is when there was a lot of snow in the foothills.

We haven't had that first run-off to amount to much for several years. (R. 2053.) I do not remember exactly when it stopped; 10 or 12 years ago.

Mr. LILJEQVIST. Q. That is probably the trouble with the lake now, isn't it?

A. Well, that is a whole lot of it; yes.

Nobody used that water that came with the first run-offs. It all went to the (Malheur) lake. There was nobody that used the water to irrigate at that time of the year, the first run-off, I mean the break-up, the first break-up.

SPECIAL MASTER. So that the diversion, if it took place, would take place from the waters of the second run-off?

A. Yes; that is when they do their irrigating.

SPECIAL MASTER. I would like to ask you a question. You speak of company lands. What company do you mean?

A. Well, I think they call it the Eastern Oregon Livestock Company now. It used to be, when we went to that country, the old French-Glenn Company. (R. 2054.)

Mr. ALFRED L. MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

I have got hay off of my property (the Marshall, Alfred A., place).

The water we get on my place comes partly from the (Blitzen) river, and part from the (Malheur) lake, but as to the patented land, most of the water comes from the (Blitzen) river.

In front of my patented lands I have some other property that I claim on unsurveyed land. There must be close to 1,400 acres fenced in there. All of the unsurveyed land, about 1,200 to 1,400 (acres) is below the (Neal meander) line, and the patented land is not included in that; I was speaking only of the unsurveyed (R. 2067) land

We have raised grain down there (on the Marshall, Alfred A., place). My brother put in some grain in there in 1889, and I think that we put in grain there in three different years, in 1888, 1889, and 1890, and that was barley and oats. That was a brother older than I was. (R. 2068.)

That grain was put in on the unsurveyed land, below the (Neal) meander line.

We planted about 100 acres, maybe a little over, of oats and barley this year on the unsurveyed land, below the (Neal) meander line, on the (Lake Malheur) Bird Reserve.

Mr. BLACKMAR. Is that field indicated on your map, Mr. Pecore?

Mr. PECORE. Yes, sir.

Mr. BLACKMAR. Will you show it to us and describe it for the record?

Mr. PECORE. It is outlined with an irregular dotted line and marked on the inside of the field with the words "Grain Field," and it lies—the south edge lies slightly more than a mile north of the meander line of section 31, township 26 south, range 32 east, south of the lake.

The WITNESS. I can not just recall the year we first ran our fence below what is now the Neal meander line (R. 2069–2070), but I know we would keep building the fence down; as the stock would come around the lower parts of the fence, we would build a little farther out every year.

SPECIAL MASTER. What did you mean by your last answer, that as the cattle went down you pushed your fences out?

A. Well, it seems as though since 1917 it would dry down, and stock on account of the feed being short outside, would crowd next to the edge of the lake, and would go down farther into the tules, and farther down, and we would build a fence on out to check the stock.

We built the fence to check the stock, and hold outsiders from coming in. We had a fence on the north line of the unsurveyed land.

Mr. BLACKMAR. Q. Did you have any fences north of the present location of the Neal meander line at the time that line was run in 1895?

A. Yes, sir; we had a little fence.

Mr. BLACKMAR. Q. Since 1889, in every year have you been able to cut hay in that portion of your lands which lie north of the Neal meander line? (R. 2070.)

A. No, sir; I think it was 1894 the water was too high, and we did not cut below the meander line some of those years.

There was some other years, I think along about 1904, if I am not mistaken, and maybe 1909 and 1910, that we didn't cut very much (hay) below the (Neal) meander line, and that is all the years I remember of.

In those years we did cut some (hay) below the meander line.

After we cut the hay down there we fed it to our stock; stacked it right there; then fed it to the cattle at those places; we built a

barbed-wire fence around the haystack to keep the cattle out, and then we fed them day by day from the stack.

Mr. BLACKMAR. Q. Could you give me some estimate of the number of tons of hay you have cut north of the Neal meander line, say in a good year?

A. Well, we never did measure our hay, simply because we (R. 2071) used it up ourselves, but we would make guesses at the hay and we often guessed we had 150 tons, and sometimes we would guess that we had 300 tons. Those were guesses.

There is a market for hay of that character in this community. I have seen hay sell for $3.50 a ton, and last year and the year before it sold for $10.00 and $12.00 and $12.50 a ton. (R. 2072.)

Cross-examination:

In 1888 I built my fence out to the water's edge. With reference to where the (Neal) meander line is, it (the fence) is just a very little ways. It starts on the northeast line of the (Neal) meander line, and just extends out possibly a quarter of a mile. (R. 2080.)

1888 was a very dry year. (R. 2080–2081.)

After that the water came back again, and then the fences stood in the water. The water was very shallow there, and we used it for pasture; we got a good deal; it could be used for pasture.

In the fall of the year the water went down some, and made good pasture land.

In the early days when I was there the water would recede in the fall of the year a quarter of a mile, sometimes more, sometimes that much, from the Neal meander line.

In the spring of the year it would come back.

Mr. LILJEQVIST. Q. Did it come to the deeded land to any extent?

A. I am talking of the west side, of the deeded lands, when I am speaking of the lake rising and going back. The west line, because the east line of my fence is overflowed by the (Blitzen) river. I mean the reverse. I was talking of the east line when I talked of the lake rising and falling, because the west line is overflowed by the (Blitzen) river. (R. 2081.)

I am located in sections 31 and 36. The length of the line of my property in section 31 is a full mile.

The west side of it is flooded by the Blitzen River, and the east side of it is flooded by the (Malheur) lake. (R. 2082.)

The times that I talked about going over the (Malheur) lake on horseback, was mostly in the fall of the year. People did not go through there much in the springtime. In the springtime that was a meadowland in there, and everybody wanted to keep their stock out of there from each side, and they would turn them out; keep the stock off that land, so that they could raise hay and grass.

Mr. BLACKMAR. You say meadowland in there. Where do you mean?

A. I mean taking all this land where we lived plumb across the (Malheur) lake west of the main—what we call the lake proper. (R. 2086.)

Mr. LILJEQVIST. Q. Didn't the lake proper, as you call it, the open water, when it backed up, fill up all over these meadowlands?

A. No, sir.

Q. A great portion of them, don't they?

A. No, sir. I think the (Blitzen) river overflows all that land west.

Q. That entire area?

A. I do. I believe that it is the river that overflows that land. I don't think the lake backs.

Q. And the Silvies does the same thing on the north?

A. I don't know much about that.

Q. When the Blitzen quits running, what happens?

A. That grows dry, and we mow hay.

Q. Before it grows dry, there is a stand of water in there for a couple of months, isn't there?

A. Yes; there is water in there, but it is not deep. The water is over the meadowlands up here just like it.

You can wade it in places, wade right along in there, in the springtime; not from the earliest time I have known it; there has been years that I suppose it would have gone over gum boots.

When I say places, that is just places in channels and low places. (R. 2087.)

When I first knew it (Malheur Lake), there were all kinds of tules growing there, and there is yet. In some places they were as high as my head and over.

There were channels all through those tules, and open places all through them. The people went out in the channels and open places duck hunting. (R. 2088.)

I have never paid any rental to the Govermnent for the land that I have out in the (Malheur) lake. I extended my line out a couple of miles into the (Malheur) lake. That is on good grassland. We have lots of stock in on that land. We get a lot of good out of it. (R. 2089.)

I do not know how high the (Malheur) lake would rise and fall.

I have seen the water (of Malheur Lake) raise possibly 3 to 6 inches up on that little bank over there near Windy Point. The water was up to that bank when we went around the (Malheur) lake there in 1887. (R. 2091.)

Mr. LILJEQVIST. Q. Do you remember the year that Cooper, who is now assistant State Engineer, with Mr. Dodge, who was the engineer at Burns, went out there on the ice when it was frozen up and took levels all over there in the ice; do you remember that year?

A. No, sir; I don't remember what year that was.

Q. 1914. Have you any independent recollection of the year 1914?

A. 1914?

Q. Let me put the question to you this way: At least when the ice was in there you know it was at the lowest stages of the water in the (Malheur) lake; is that correct? When ice formed?

A. I suppose that is so; I don't know whether that is right or not.

Q. I am not talking about that particular year. I am talking about any year. From your recollection and knowledge of the country since '89, or around that time, when the ice is on the lake in the fall and winter, isn't that the lowest stages of the water in the lake?

SPECIAL MASTER. Every year?

Mr. LILJEQVIST. In any year.

A. Any year? No; I have been out there on that (Malheur) lake and skated, when after it would freeze it would sink so we could not hardly get out on what we call the shore, simply because the ice would sink from the freeze, and it would make a slope, and we would take our skates off so we could walk on out to the shore line. (R. 2092.)

That is the slope on the edges, on the west side of Cole Island. The ice out in the lake would be on the water.

Mr. LILJEQVIST. Q. I am asking about out in the lake where the ice was firm. Now, that would form when the lake was at its lowest stages year after year?

A. Well, I suppose; I don't know how to answer that.

Q. Don't you know?

A. No; I don't understand.

The (Malheur) lake lowers in December, January, February, and March. It would seem like the freeze would dry it up. (R. 2093.)

Mr. WILLIAM HENRY MCKENZIE, called as a witness for the plaintiff, testified in substance as follows:

I have been all over the west half of Malheur Lake.

Mr. BLACKMAR. Q. What was it known as to you and the other people who lived in the Narrows in those days? Did you call it the lake?

A. No. We always called it the swamp. (R. 2149.)

Cross-examination:

I do not think that I have ever seen the water (of Malheur Lake) go over the bank out near Windy Point. (R. 2160.)

When I have seen it dry at the Narrows, I have seen a lot of water in the open part of the (Malheur) lake. (R. 2161.)

Mr. ARMSTEAD ELLSWORTH BROWN, called as a witness for the plaintiff, testified in substance as follows:

In September of 1888, I crossed on horseback what is known as the (Lake Malheur) Bird Reserve. (R. 2176–2177.) There were other people in the party. There was William Helmick, a partner of mine at that time. We had been to Burns, Oregon, and came out there by Lawen, stayed all night, and then went south and crossed down that road.

Mr. BLACKMAR. Q. Now, from Lawen tell me how you got across the Bird Reserve?

A. Well, there was a road across there. I couldn't tell you just the exact point that we went in there, but there was a road leading across there, and we followed that road.

SPECIAL MASTER. Q. You followed the bed of the (Malheur) lake?

A. Just about the middle of the (Malheur) lake. It is close to where this Adam George Ranch is that you speak of; right straight on south through to the left of where the Springer Ranch comes out there.

We came out (on the south side of Malheur Lake) just a little to the east of the Springer Ranch; just about a little east of the Sodhouse Springs.

Mr. BLACKMAR. Q. From the appearance of the ground could you tell whether (R. 2177) or not other people had preceded you on that same route?

A. Yes, sir; there was a road there.

Q. With both horse tracks and wagon tracks?

A. Yes, both horse and wagon tracks. (R. 2178.)

Mr. RUBIN T. HUGHET, called as a witness for the plaintiff, testified in substance as follows:

I remember a corral called the Stauffer corral at Windy Point. (R. 2179.) I can not give you the exact location of it, but I can give the approximate location of it.

The corral was situated near the cut bank on the east border of Malheur Lake, at a distance not to exceed 100 yards from the bank, and west, or northwest of Windy Point. I recently examined the ground in an endeavor to find the exact location, but I was not able to find any trace of the corral.

I first saw that corral about the 10th or 12th of June, 1885; and I think it was moved from there about the year 1887—that is, the remains of it, or what was left of it.

I observed the little bank in the neighborhood of the Stauffer corral (near Windy Point), many times, for a long term of years. I have never seen the water (of Malheur Lake) up over that bank.

I have seen the water up to that bank (near Windy Point) when the wind was blowing, and the waves were washing up against it, but I do not recall that I ever saw the water up against the bank when it was at its level—normal level. Now, in order not to mislead (R. 2180) you, or anyone else, I would like to state that down farther south that bank is extinguished, and there is no bank there; the salt grass approaches the water very closely, and it is just a gradual slope from the water level out toward the sagebrush. In other words, this bank does not extend along the entire east end of Malheur Lake. The bank fades out at the south extremity of the east side of the (Malheur) lake. (R. 2181.)

Prior to 1890 I observed those roads which passed within the present limits of the (Lake Malheur) Bird Reserve, and I traveled them on horseback, that is, in the vicinity of them, and followed

the roads to some extent, the very prominent roads. During those early years I rode to quite an extent for cattle ranged in what is known as Malheur Lake lying north of Springer's (place) and Dunn's (place), and toward Red Campbell's (place), and Doc. Graves' (place).

Mr. BLACKMAR. Q. As accurately as you can, tell me where these roads were located.

A. Why, now speaking of them as roads, each year they broke a new trail through the tules, but the crossings in the lower grounds were practically in the same place; that is, through the sloughs, but each year they made a new road, you might say.

There was one crossing, or one road leading from Scott Haley's (place) through the swamp—not in a direct line, but coming out (R. 2184) about the Reinemann place. That trail was used by horsemen and by people with wagons and buggies.

Another road started from the north side at the same point near (Scott) Haley's (place), and crossed over to the ridge where Mr. (W. A. Red) Campbell's house was situated, and the Huffman house; and from there angled across, and came out at about Alva Springer's house, or the Sarah E. Marshall house. That trail or road was used by horsemen, and also by people with wagons and buggies.

One other way of crossing (Malheur Lake) was from somewhere in the vicinity of Doc. Graves' house, crossing south in a southerly direction toward the Spring Branch, or Alva Springer's (place), or in that immediate vicinity. Some of them coming out crossed my mother's place, and others probably farther east; and perhaps some others would come out a little farther west. It depended upon the point of destination as to where they wanted to go.

Those roads were used generally in the fall of the year. (R. 2185.)

At this time I can not fix the date of how early haying has been done in some part of that section of the (Lake Malheur) Bird Reserve that lies west of a line running north and south through Springer's Ranch; but it was considerably before the time that Mr. Neal made his (meander line) survey (in 1895), but just how long I am not able to say.

Mr. BLACKMAR. Q. Well, since your earliest recollection down to the present time, those haying operations have been carried on there (R. 2191) from year to year, have they not?

A. I really don't think there was any haying in that section during those two years of 1894 and 1897; and I would like to explain at this time, Mr. Blackmar, my acquaintance with the (Malheur) lake practically ceased in 1910.

Since 1910 I have lived in Burns, and I have had very few occasions to visit Malheur Lake.

Mr. BLACKMAR. Q. With that limitation upon your answer, will you answer the question, please?

A. With the exception of the two years mentioned I think hay was put up in that section practically every other year—as far as I am able to remember—every year, with the exception of those two years. (R. 2192.)

Cross-examination:

When I went through there (western part of Malheur Lake) duck hunting in those days I went in the fall, or in the winter. (R. 2194.)

Mr. LILJEQVIST. Q. Do you know of any stock being lost out there; large quantities of stock being lost out there in the early days?

A. I wasn't here early enough to be a witness to any loss of stock, Mr. Liljeqvist. (R. 2195.)

Mr. JOHN MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

I remember an occasion back there in 1889, when I was nine years old that we took some cattle from Harney. We had taken cattle down in west of Saddle Butte, went in west of Saddle Butte and took a direction out toward Pelican Island. I can show you better there on the map (Plaintiff's Exhibit 3) just about the way we went, if I can find where Saddle Butte is. Now, we traced this out the other day. If I remember right, we went in there from Saddle Butte and we took a southeasterly direction out in here, and then came back toward Cole Island. Now, the reason why we did that, is, my two older brothers argued about the mirage out there, and one contended it was water, the other contended it was not, and so finally the racket got so (R. 2236) hot they concluded they would drive right into it, and they did; they turned and drove right down in there, and there was no water in there at all; we came down here somewhere in about where the old cane patch was on Cole Island. I think that is along down in there some place [indicating].

SPECIAL MASTER. Indicating what?

Mr. BLACKMAR. Indicating down about the south——

A. Well, I will say about the way we tried to drive. [Indicating].

Mr. BLACKMAR. About the south tower he means.

A. Yes; we came in here, along down in there some place on this (indicating); just about where they say now is the continuation of Cole Island.

Q. Yes.

A. Down in here [indicating]. Here is Pelican Island over here. One of the boys contended we had to go plumb around Pelican Island to get around here, but we didn't do it. We went down in there [indicating], what the surveyor told us was the continuation of Cole Island.

Then we went right straight southwest to Cole Island and hit Cole Island right along up in here some place (R. 2237) about half way between the north tower and the south tower. Then we drove our cattle right on down on Cole Island to the end of it, and then went over to what is known as the Ted Dunn place. There was a grease-

wood point there, and we went over that point and around in here to George Marshall's (place). George Marshall is down here some place near the Blitzen (River).

I used to know all of those settlers up in the west end of the (Lake Malheur) Bird Reserve; Haley, and Campbell, and all of those.

During the period from 1890 to 1900 there were roads that ran through that section of the (Lake Malheur) Bird Reserve. I have used those roads. Sometimes we would drive cattle through there, and sometimes we hauled wood from Dog Mount came through there, through the Scott Haley place.

At the times we hauled wood through there (R. 2238) I would not say that it would be a very heavy load. I would not say whether it was a cord, or how much we would put on a load of juniper limbs, what we thought two horses could pull; and would go down through there in the fall of the year. Now, that did not happen very often, but it has happened a time or two.

I have ridden horseback through there many times, and other people used those roads. The roads would be used always late in the fall.

I do not know of any time that we ever went through there in the spring, although there might have been times that we did, but I do not remember any time we went through in the spring. (R. 2239.)

Cross-examination:

There were times when my brother (George Marshall) had hay and at other times he could not get in there. A lot of those places where the cabins were placed (R. 2239) there were times when you could not get in there at all. At one time, some year, my brother cut hay and then the water came along and it was isolated down there. The place that hay was on, was in I would say three-quarters of a mile, and it might possibly have been a mile, north of the (Neal) meander line; that is known now as the Hill Brothers place. (R. 2240.)

Mr. ALPHENA VENATOR, called as a witness for the plaintiff, testified in substance as follows:

I recall a road which came down by way of Saddle Butte to Cole Island, and then on to the south side of the (Malheur) lake.

The first time I was on that road was in the fall of 1889. The general public used that road to travel on; they were hauling timbers, lumber, poles, posts, and so forth, going in toward the Sodhouse and the Blitzen (River). There was quite a lot of stuff hauled from Harney (Oregon) cross that road that year. (R. 2324.)

Mr. MARTIN H. BRENTON, called as a witness for the defendant, testified in substance as follows:

I saw the place opposite Windy Point in 1881. (R. 2369.)

(No cross-examination.)

d. 1890–1900

Mr. SCHUYLER WHITING, called as a witness for the plaintiff, testified in substance as follows:

After 1879 we were down to Malheur Lake every spring after the ice broke up, sometimes as early as April 15th to along in the middle of May. (R. 176–177.)

After we got the horses out of there in April and May, I would go back down there except once in a while in the summer time. (R. 177.) We would find the horses along the edge of the lake. I have seen the water in the (Malheur) lake vary from about half a mile below Lawen until it was plumb dry, you might say. I was down there this summer and the lake was dry where there used to be water. In the early days the lake did not get that dry. (R. 178.)

I have been on the old road that runs by Windy Point and Saddle Butte and then on down to Winnemucca. I went over there with my father in the spring of 1890. We crossed Malheur Slough at the bridge and went around (R. 178) between Saddle Butte and the other point to Windy Point, and from Windy Point to the well. I can not say exactly, but it seems to me that from Windy Point out to the edge of the water of Malheur Lake was nearly a mile. I have been there several times since and that distance is about the general average of all the times I was there. (R. 179.)

In the summer of 1896, I helped put up hay at the Sodhouse and if I remember right, it was a mile or so north of the Sodhouse to the edge of the water or wet land where we did the haying. We hayed out there as far as we could. I am referring to the Sodhouse Ranch and not just the Sodhouse Springs. The Sodhouse Ranch is west of the Sodhouse Springs. (R. 180.)

Mr. THOMAS GEORGE HOWSER, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

From 1890 on, I have seen the water near Windy Point; when the wind was blowing I have seen the water splashing up several feet above the bank because of the wind. If it settled down to level, it would not be up to the bank, but in places about one to two hundred yards from the bank. When a heavy wind would come it would splash out. At high water the water of the lake was right up to the bank (at that point). In ordinary normal high water it would vary from that bank probably a couple of hundred yards; and in real high water it would be up to this bank. The high water varied; the springs varied in the amount of water that came into the lake. It depended upon the snowfall. I have seen the water around the northerly part of Saddle Butte. (R. 226–227.)

Prior to the present time, 1889 was a very dry period in eastern Oregon; it was very dry there for two or three years. I can not say when the water came back after 1889. (R. 228.)

Mr. JOHN GARDNER, called as a witness for the plaintiff, testified in substance as follows:

The water was up in 1893. (R. 274.)

There was lots of water in 1895. The bridges were washed out. The (Malheur) lake was a pretty fair size that year, but it all went back so that we cut hay on it that year; it all receded and went back; it was up to the Narrows road, where we went to get across there.

1896 was an average year, but the water did not come up quite as far as it did in 1895, and we had lots of water.

1897 was a high-water year; the bridges and things were washed out in this country that year. They used a boat at the Wilson place on the other side of the Silvies River about three miles from Burns to bring the mail into Burns. (R. 275–276.) The water came out of the Silvies River. (R. 276.)

Mr. LOUIS WOLDENBURG, called as a witness for the plaintiff, testified in substance as follows:

Subsequent to November 28, 1889, I took up a homestead near Malheur Lake, about half a mile northeast of the house on the Adam George place (R. 749) on the north side of Malheur Lake, right on the Silvies River; the Silvies River went right through the place. (R. 750.) (Mr. COLLINS. His place is in section 25, T. 25 S., R. 32 E., and is known as the Herman Ruh place. R. 750.)

I stayed on that place off and on during the summer of 1891. (R. 749.)

Herman Ruh was the only owner of that place, and it was located below the 1877 meander line. The land that I squatted on was not surveyed land. (R. 750.) We started a mowing machine (cutting hay) there quite late that year, but we did not cut very much hay, about two or three loads. It was mostly tules, or flag grass that grows along the tules.

We had lots of water that year on my place (known as the Herman Ruh place—R. 749–750). In the spring when we tried to get corners on it, I waded in water clear up to my waist, and we had poles that we would feel ahead with to see if we could get deeper water or not. We could not tell where the channel was. That was a year (1891) when the whole country appeared to have overflowed; there was lots of water. I built a house on that place. When we went down there, we had to go away around by the Island Ranch. This place was about six miles due south of Lawen, and we could not go through there in a rig, or at least we thought we could not; we went around by the Island Ranch, and on the high ground to get to it. That was on account of the Silvies River being overflowed at that time. (R. 751–752.) I think the water started going off of my place the latter part of June or July, but it did not go off of all of it; it receded very fast; that was characteristic of the country. The water evaporates very fast in this country.

From the first time I saw the water on my place until the next time that I went down there, it might have remained on there about sixty days; I was just down there one year. (R. 752.)

Mr. CLARENCE THOMAS CAREY, called as a witness for the plaintiff, testified in substance as follows:

I owned a piece of land at one time, which I had homesteaded (before 1900, R. 771), near Saddle Butte, which we used for pasture land and hay land together. After hay was off we turned the cattle in on the pasture. (R. 761.) I do not know where that land is with reference to the 1877 meander line. That was before my time, and if it was ever marked, I never knew it.

(NOTE.—The description of this land as shown on Plaintiff's Exhibit 21 is the north half of the northeast quarter, and lots 2 to 10, inclusive, of section 19, T. 25 S., R. 33 E. The date of the patent indicated on the Exhibit is March 5, 1906. Pecore R. 769.)

Mr. BLACKMAR. Q. And where is it with reference to the Meldrum line?

Mr. PECORE. Part of it is above, and part of it is below. (R. 769.)

The WITNESS. The water that we got on that land was mostly backwater from the lake. This piece of land was farther west or east than the overflow from the Silvies River ever reached. The water we got on that land was from Malheur Lake and from Malheur Slough together.

During the run-off Malheur Slough had quite a stream of water which came down from the uplands through the Slough into the lake. (R. 762.)

I had this place of mine fenced.

We turned the cattle into these pastures, and they gradually would work out into the tules of their own accord; as the (Malheur) lake receded the cattle advanced into the lake; they would take the mud and water during the warm season and early in the fall and go out into those islands. I have seen cattle pasturing in the fall months before the coming of the ice a mile or a mile and a half south of my place. I have been at other parts of the lake during the fall months and before the coming of the ice, and the distance that the cattle go into the lake depends upon the recession of the water. (R. 763.)

I have cut hay on my place that I had along the shore of Malheur Lake, but I never have gone into the lake and cut hay, but quite a number of other ranchers did; they have cut hay every year; not out in the lake proper, but around the edges, until the last year or so, when it was too dry; they cut hay on the islands that run out into the lake proper. (R. 764.) It is rather difficult to locate the lake proper down there. The water changes from year to year, and I could never tell from one season to the next how high it was going to be; I never remember of seeing two seasons alike. I do not suppose there are two recessions the same.

Mr. BLACKMAR. Q. Even in the early years when you were there, there was a considerable spread, wasn't there, and a considerable dif-

ference between the high point reached in the spring, and the low point it reached in September and October?

A. Yes.

I have been around Windy Point, and a short distance from there there was about an eighteen-inch or two-foot step-off there.

Mr. BLACKMAR. Q. Now, do you get that formation all around the lake, or are there parts of the lake where it just slides off gradually?

A. Yes, that is the way it is. Just a few places where (R. 765) this bank shows; and the other places it is just a gradual slope.

Q. And not much of a slope at that, is it?

A. I suppose it is not a big one, no. (R. 766.)

Cross-examination:

I located on that place about 1900, but I do not know where the old Meldrum (1877) meander line is. I filed in the Land Office. (R. 766.)

Mr. LILJEQVIST. Q. Then you must have filed upon patented lands, because 1890 was before Neal surveyed the land. Let us get this straight now. You filed in the Land Office on a homestead, didn't you?

A. Yes.

The land was located near the mouth of Malheur Slough where it enters the lake. I obtained a patent for it.

SPECIAL MASTER. Can we find that place on the patent map?

Mr. PECORE. Yes, your honor; it is here. (Indicating on map, Plaintiff's Exhibit 21.)

Mr. LILJEQVIST. Q. Now, where did the water from the lake in normal seasons go to with reference to your patented lands?

A. Well, I do not know what you would call a normal year there.

Q. Well, an ordinary spring of ordinary high water. (R. 767.)

A. That water, it was never two years the same. I do not understand what you are trying to get at by normal year, or an ordinary year.

I have no way of knowing how far the water receded between the highest point in the spring and the lowest point at any time that I was there, in any one year. I know it receded from the high-water mark in the spring to the recession in the fall, but just the depth of the water I couldn't give you that. I know where my homestead is that I obtained a patent for, and I know where the lines of it are, (R. 768) but I do not know where it is with reference to the Meldrum line (the 1877 meander line).

Mr. LILJEQVIST. Q. Then your date is in error. You homesteaded that and got your patent in 1906. Does that refresh your recollection.

A. I think that is about right.

Q. According to that description which was just read into the record the southerly line of your land was at the Neal meander line.

A. I think so.

At that time there was no Neal meander line marks so that you (R. 769) could tell it, but from the records we filed on this land we could tell. We filed on that land in 1900.

Mr. BLACKMAR. May I suggest he probably filed in 1901 because it was a five-year homestead. It might have been pretty close to 1900 or 1901.

I knew about where the southerly line of my homestead was.

The water in the spring would come and overflow part of this land. It never got over all of it by any means, but it flooded part of my patented lands (R. 770), and this gave me grass in the spring-time. The recession of the water from the southerly line of my patented lands during the dry season of any year (R. 769) would run all the way from a half a mile, I suppose, to three miles, as near as I can tell, during the period that I owned that land, which was many years before 1900.

SPECIAL MASTER. Your question covered all the period except the late period?

Mr. LILJEQVIST. Yes.

I could not tell you when the water was three miles south of my deeded lands. I think the dry season we had while I was there was about 1917 or 1918, and that was the time the water receded about three miles. Before 1917 it varied. I can not give any definite answer on that. (R. 771.)

The water didn't get high enough to cover part of my patented land so that I could get a hay crop every year. I think there were about six or seven years that I cut grass off of it; that was covering the period from the time I located on it up to 1924. I did not get any hay in 1923 there nor in 1922. (R. 772.)

I do not own those patented lands down there now, I sold them to Dr. Denman, and my son owns the land. (R. 773.)

Mr. SIMON LEWIS, called as a witness for the plaintiff, testified in substance as follows:

I ran and fed cattle in Malheur Lake covering the period 1892 to 1900.

Mr. BLACKMAR. Q. Were you present in the court room this morning when Mr. Kilburn testified as to the manner in which cattle were handled in the winter down there in the lakes?

A. Yes, sir.

Q. And what you heard, does that seem to be the situation as you saw it from time to time? Would it be about the same as Mr. Kilburn testified to?

A. Yes; that was something like the way they were handled.

Formerly I held the position of treasurer of Harney County for a couple of years. In 1892 and 1893 I was road supervisor of Harney County for the north side of Malheur Lake; there was another man on the south side. (R. 780.)

I obtained patent to a piece of land on the north side of Malheur Lake. (R. 781–782.)

(NOTE.—Mr. PECORE. That was in section 17, T. 26 S., R. 31 E., north of the lake. The patent map, Plaintiff's Exhibit No. 21, shows "Simon Lewis patented on August 12, 1901.")

Mr. BLACKMAR. Q. That covered down to the Neal meander line, did it?

Mr. PECORE. Yes, sir. (R. 782.)

The WITNESS. I lived on that land for about eight years. (R. 782.)

From time to time in the flood time of the year; I used to get water on that land; the water came from the Silvies River; I raised hay and a little grain on it, and a very little garden in the years that I did not have too much water; there were a couple of years that I had too much water; every year that I lived on it I had water; it didn't cover the entire place; the lands that I deeded it (the water) did not cover a great deal, not all of it at least, only a portion of it; but the land that I claimed, or that the water came over, there was quite a lot of that that had water on it. By deeded lands I mean the lands that I had received a patent for from the Government. The land that I claimed was the land that was in front of that patented land.

Mr. BLACKMAR. Q. How far would the water come up on the land that you claimed? (R. 783.)

A. Well, there was a channel or two and the water would be in the channel; it would be over most of it, excepting one little island that it did not go over. (R. 783–784.)

Q. There were some years, weren't there, that you had dry years and not very much water?

A. No big lot, but I had water there every year I was there until along in the fall. In the fall the water would recede, and there would be very little water.

The water would go off my patented lands before it would go off the lands in front of them.

Mr. BLACKMAR. Q. And there was something in the nature of a slope to the land that made that?

A. Yes; I suppose so.

Q. How many days would the water stand on an average on your deeded lands?

A. It would be owing to the season. There were a couple of seasons down there that the water was on the land all the time, never did get off until it was too late to crop it. The balance of the time it would hardly be on it at all during the seasons—that is on the deeded land, the land that I finally deeded.

In other years, the water would go off all of it, unless there were some holes. (R. 784.)

Mr. BLACKMAR. Q. So that the length of time that it (the water) stayed on your land changed from year to year, depending upon the amount of rainfall and snow that they had in the mountains?

A. Yes, sir.

Q. Down on the lands in front of you, I presume that the distance that the water would go up on those lands varied from year to year according to precipitation, did it?

A. Yes, sir.

The length of the time that the water stayed on the land in front of the patented lands would vary, some seasons it would go off earlier than others. It generally would be down so that we could cut our hay along about August, pretty late in the summer.

I presume I cut hay quarter of a mile out in toward the (Malheur) lake from the line of my patented lands. That is as far as I tried it. I did not cut the hay down for the same distance every year; some years we would cut a little farther in, others not so far. (R. 785.) It would depend upon the water. There were other people cutting hay out in the lake bed south of me.

Mr. BLACKMAR. Q. And that hay was stacked up in the lake bed, wasn't it?

A. Well, I suppose you would call it the lake bed. It was in some of the higher places.

If the hay was not fed, it would remain from year to year. (R. 786.)

Cross-examination:

Some springs the water would come up over the (Neal) meander line up on my deeded lands.

Mr. LILJEQVIST. Q. Would you say that the (Neal) meander line was a fair and reasonable approximate line for the water in the normal season in high water in the lake?

Mr. BLACKMAR. I presume that is qualified by what he has said that it would change from year to year.

SPECIAL MASTER. That has reference to the (Neal) meander line in front of his holdings?

Mr. LILJEQVIST. Yes, your honor.

A. I think something close to it.

Mr. LILJEQVIST. Q. When the Government was making its investigation on this subject, you were asked the question:

"Q. Take the period of from March to June when we have the highest water in the ordinary years (and we must not consider the exceptional years one way or the other) have you any way of telling me about the margin of the lake—the area of Malheur Lake? Would it extend to what we now know as the (R. 787) second meander line?"

And your answer was (according to a copy of your statement which I have in my possession):

"Well, it would go right to the second line."

The WITNESS. The second line? That is Mr. Neal's line?

Q. Yes. Now, is that answer substantially correct?

A. I wouldn't say it would go right to the second line.

Q. Didn't you testify like that?

A. I don't think so.

SPECIAL MASTER. I think that the word "testify" will be confusing.

Mr. COLLINS. He was not testifying to me, Mr. Liljeqvist. I was merely trying to get the basis of his knowledge.

Mr. LILJEQVIST. I know.

Q. I am asking you if in response to this question did you not make this answer I read to you and I am handing you copy of your tesimony which I will ask you to read?

Mr. BLACKMAR. There is no dispute about that. That was a statement taken from Mr. Lewis and he signed it, and it was given to the Government. We gave it to you; there is not any dispute about that.

Mr. LILJEQVIST. All right. (R. 788.)

Q. Do you still stand by the statement that you made to the Government in its investigation: That the waters of the lake in its ordinary seasons of high water came to the second meander line on your place?

A. And would not pass over it?

Q. Well, it passed over it, did it?

A. It would in some places. It wouldn't all over it as far as that goes.

Q. You mean to say in the ordinary year when the lake backed up, the water went out to the Neal meander line, and some little distance out upon the deeded or patented lands of yours, is that correct?

A. It would go a little back of that patented land, or at least, it did on mine.

Mr. LILJEQVIST. I am not trying to impeach him, I am trying to find out what his statement is.

SPECIAL MASTER. You used the word "testimony", and a judge would think that that was his prior testimony given here.

The WITNESS. Some years you could cut hay a little farther out into the lake than other years. (R. 789.) At times hay could be cut out in front of the (Neal) meander line until August. Sometimes in the wet years, people could not cut hay down on those places that have been termed "islands," below my property, when the water was high there. The ordinary seasons, though, they would cut hay in there after the water went down. The water would go down south of my property kind of late, but I do not recollect the month. It would be as late as August, maybe a little later than that. (R. 790,)

Redirect examination:

I am familiar with Scott Haley's place inside of the (Neal) meander line, but he did not live there all of the time in his house, but he did part of the time (R. 790), and cut hay down there. And the same is true as to Red Campbell and Jason Bennett and Z. L. Thomas. I do not know George Thompson, or Charlie Riley, or Ed. Taylor, but Campbell and Bennett and Thomas all had places down in there (in Malheur Lake) and had their livestock in there, and their hay in

there. Later on there were other people who resided in there, but not right at that time, but I helped those people. We worked together in putting up hay.

Mr. BLACKMAR. Q. That section of the lake was pretty well firm at any rate most of the time?

A. Most of the time. (R. 791.)

Recross-examination:

I think there were two seasons that the people could not get in there (into Malheur Lake) at all while I was there (R. 791) and many years it would be during the late part of the season.

Mr. LILJEQVIST. Q. Then the water stood sometimes from about February when the water rose in the spring when the freshets came in, until they went in there to raise hay?

A. It was later down there when the water came in, it was later in the spring.

I think they were probably taking water out of the Silvies River for irrigation up above, but I was not down there. I did not go down to find out whether there was a lot of irrigation going on in the upper valley.

SPECIAL MASTER. I understand that you were there eight seasons, from 1892 to 1900, is that right? (R. 792.)

A. Yes, sir; from 1892 to 1900; or 1901 possibly, but I did not live there after 1901. (R. 793.)

Mr. J. L. CAREY, called as a witness for the plaintiff, testified in substance as follows:

I think in about 1900 I took up a homestead here, for which I obtained a patent from the Government. (March 5, 1906. R. 795.) That place is located near Saddle Butte, on the edge of the north side of Malheur Lake. I do not own the place now. (R. 794.) I do not know who is the present owner.

(NOTE.—The date of patent to Mr. J. L. Carey is March 5, 1906, and it covers the northwest quarter of the northwest quarter of section 19, T. 25 S., R. 33 E; the southeast quarter of the northeast quarter of section 24, T. 25 S., R. 32½ E.; the northeast quarter of the southeast quarter of section 24, and lots 6 and 7 of section 24, T. 25 S., R. 32½ E., as shown in Plaintiff's Exhibit 21.—Pecore. R. 795.)

This land did not come down to the Neal meander line; my father took up a homestead on land right in front of me there, and his land did not come down to the Neal meander line, but my brother (Clarence Thomas Carey), who has testified in this case, had a fraction of land between my father's land and the meander line. (R. 795.) My father had a home on there and my mother proved up on the homestead after his death.

I was down on that land about six or seven years, maybe longer. Some of my land was hay land; some years we put up hay and some years we did not, depending upon whether or not we got water.

The water we got on our land was back water from the lake; but it did not come to the same place every year, it varied; I do not know whether it came to the same place in any two years; there was quite a bit of variation between the water that came when we had a good water year and when we did not have so much. (R. 796.) I hardly know how to estimate the difference; but it would, in my opinion, vary anywhere from a mile to a mile and a half; I do not know whether that is right or not. At that particular place where the Carey properties were, there was no bank, just a gradual slope. (R. 797.)

We did not cut hay down there on the lake bottom; we cut it on the land we owned. There are other people below us that cut hay. There was a ranch below my place that cut some hay. Part of that ranch may have been inside and part outside of the (Neal) meander line, I do not know how the meander line runs there; I paid no attention to it. When I speak of "below" I mean south and a little east of my place. (R. 797–798.)

Mrs. EFFIE L. DUNN, called as a witness for the plaintiff, testified in substance as follows:

When we first came to Harney Valley in 1892 we settled the first fall and winter on what was then known as the old Bland place, and later the McGowan place; the old Bland place was only three miles north of the Narrows, on the north side of Malheur Lake; the house in which we lived was within the Neal meander line. (R. 842.) We lived there until the spring, about March or April; then we moved to what was called the Riley place, where there used to be an old log house; one room was lumber and the other was log. Mr. Riley's first name was Charlie, but I was not acquainted with him as he moved away in the late summer of the year that we came there in October. The Riley house was also within the Neal meander line.

At the time we lived there at the Bland house and at the Riley house, there were other settlers living in there within the Neal meander line; I don't know exactly how that (Neal) meander line runs all through, but there were a lot of people in there at that time; we had a lot of neighbors. Jason Bennett was there; the Grouts were there; they were pretty well to the north side (of Malheur Lake); I don't know whether they were within that meander line, but they lived there. A man by the name of Wilson had land in there. (R. 843.) I lived within what was afterwards laid out as the Neal meander line which was run in 1895.

I remember Pinto Tom who was living there at that time.

All of those people down there had some stock and horses, and the usual things that a farmer owns, including some tools; they all had little ranches in there and always put a bed for the stock. They raised their families there.

We continued to live at the Riley place for some years; my folks lived there for four or five years; then after that, they moved out farther to the west out beyond the (Neal) meander line and put up a

house there (R. 844), and afterwards, they sold it to Gerald Griffin (R. 845).

While my folks were living there, I taught school on the south side of the (Malheur) lake in what was known as the Springer district or the Sodhouse district. The schoolhouse was located up near but a little east of where Mr. Benson, the warden in charge of the Government reservation, now lives; it was right near the Sodhouse Springs. I always rode horseback or went with a team to get to school, and in going there I went through the tules and up through the land that was within the (Neal) meander line. The first term of school I taught was in the (R. 845) Sodhouse district, in the fall of 1895, and I boarded with Mr. Springer; nearly always on week-ends I went home and then came back either Sunday evening or Monday morning. Several years afterwards, I taught in the same district again, but I don't remember exactly how long afterwards. Then I taught two terms in what was known as the Simon Lewis district; that is over on the other side (of Malheur Lake).

While teaching school near the Sodhouse, making the week-end trips, I didn't have any difficulty in making the trips home, and the trail or road laid within the Neal meander line. Sometimes I made the trips alone, sometimes my sisters would go with me, and return with the horses. I was not going with Mr. Dunn at that time.

The house where I lived at that time was quite a long ways south of Mr. Scott Haley's place. (R. 846.)

There are no houses there now that I know of that are right close to where the house I lived in was located, but that land is claimed, or listed on the map (Plaintiff's Exhibit 3) here as the Creason land. I think Mr. Harris still claims some of that land, also, and it was sold to Mr. Pete Caldwell. He was the one who moved the house away a couple of years ago, but there are none there now; they have all been moved away. Mr. Creason's would lie pretty well to the north end of Mr. Creason's land, I think.

Mr. BLACKMAR. Let the record show that the witness identifies the place. (R. 847.)

Mr. PECORA. On Plaintiff's Exhibit No. 3, the house, as she (the witness) describes it to me stood about a mile and a quarter north, and a little west of a windmill shown on this map in lot 9, section 25, T. 26 S., R. 30 E., south of the lake.

Mr. LILJEQVIST. And she also said it may have only been three-quarters of a mile.

Mr. BLACKMAR. Q. What is your judgment about that, Mrs. Dunn?

A. Well, I imagine it would be close to a mile and a quarter. (R. 848.)

I taught school up on the north side of Malheur Lake in what was known as the Simon Lewis district; the schoolhouse was pretty close to the patented Creasman property.

(Mr. PECORA. I believe that Scott Haley can identify that, but he has described that school to me as being three-quarters of a mile from his present home.

On this patent map, Plaintiff's Exhibit No. 21, John Creasman is shown as the patentee of the northeast quarter of the northwest quarter, and lots 2, 3, 6, and 7, section 18, T. 26 S., R. 32 E., north of the lake. R. 848–849.)

The WITNESS. When I taught in that school (Springer or Sodhouse district school) (R. 845–846), the one term, I went right straight across (Malheur Lake), and I walked; I taught in the fall of the year, and I walked straight from where we lived to the schoolhouse, and there was no water in there at that time. I believe that was in 1894 that I taught there the first time.

The second time, my father lived out on the new place that I have told about, out west; it must have been beyond the Neal meander line, or pretty close to it; it was our own house, but afterwards my folks sold it to Gerald Griffin, and the house has now been moved away, but it was a little west and north from the McKenzie place; not where the McKenzie house is now—that is the Elliott property; but he had another place that lay a little east and north of where the (R. 849) McKenzie property now is, that is where the house is. It was located about two miles west, and may be a little north, mostly west, from the Riley place; I don't know just how that meander line runs around there.

Mr. BLACKMAR. Will you make a note of that, Mr. Pecore, and have that located for us?

Mr. PECORE. Yes.

The WITNESS. In getting to school, I followed around on the outside of a road that was there. (R. 850.)

During my school days down there (around Malheur Lake) I was living there during the entire year; my folks lived all of the time on the Riley place during the four or five years they were there; except when they moved away in July, 1894, and returned in a month to put up some hay for their stock in the (Malheur) lake, and I suppose it was September or October. When my folks returned to the Riley place, I did not return home until spring; I was going to school in Burns that winter.

When I returned to the Riley house, it didn't have any evidences downstairs of the floors having been flooded. The water never got up on the floor; the water was high, and at times it would come up and we could push our boat up to the doorstep and tie it there. Then again, the wind would blow and drive the water all off that knoll that the (R. 852) house was on until it would be high and dry, and the water might stay away for two or three days; then maybe the wind would come from the west again and blow the water back. When I was living up there on the place that my father patented, we were just outside of the (Malheur) lake bed there. After Mr. Dunn and I were married, then we got closer back to the lake again, and we have continued to live in that country ever since; we have been here at least part of every year. I have never been away from here, except a couple of months was the longest I was away from Harney County since I moved here in 1892. (R. 853.)

Mr. BLACKMAR. Q. After you and Mr. Dunn were married and you moved up (R. 853) to his place, what can you tell me about the water from year to year, and from season to season as you have seen it here in this community during the 35 or 40 years of your residence?

A. There were never two years alike, hardly. Some years it was higher, and some years lower, but we were always able to put up a good crop of hay on his land, always.

Q. From your experience, have you ever seen two years when the weather was alike?

A. Oh, no. You can never tell. Now, you take where it is a dry year one year, and you get a lot of moisture the next year, maybe there will be more rain; there will be quite a bit of water that year; if there is another year where there is a lot of moisture during the fall and spring, you still get more water; and if you have a dry year, then it is lower again.

Mr. BLACKMAR. I wonder if we could get at it by this kind of an example:

Q. If this next winter should turn out to be a real wet winter—basing your answer, of course, upon what you have seen and observed—would it take considerable moisture to fill up this lake?

A. Yes; it would take several years of big snowfalls to ever bring this (Malheur) lake back to anywhere near what it used to be.

Q. I assume that you have seen the settlers cut hay within the (Neal) meander line in practically every year, haven't you?

A. Oh, yes; until the last couple of years. It has been so dry that many of them didn't have any hay. (R. 854.)

Q. But, as a rule, and as a general thing, the water receded sufficiently so that they could cut hay every year?

A. Oh, yes; always. There were a lot of haystacks in that swamp when I came to the country, and there have been since, until we had years which were so dry that there wasn't any water that came on that land to be able to make hay.

I have never ridden horseback over a great part of Malheur Lake; I never did ride such a big lot. Riding to and from the school was the most that I did on Malheur Lake. I never rode the cattle, or anything like that at all. I have driven a buggy for some part of Malheur Lake, but that would be just in going from one neighbor's house to another, or going from my home to school as I have already related. (R. 855.)

Cross-examination:

I taught my first term in the Sodhouse school district in 1895. Mr. Neal ran that meander line while I was teaching. I think I started in September and taught up to just before Christmas. (R. 855.) Then I taught a couple of months in the spring several years afterwards, I don't remember just when, but I taught in May and June, and at the latter time, I think the schoolhouse had been moved just

a little farther east than it was when I taught there the first term. (R. 856).

I know where part of the Neal meander line was run; not all of it, but some of it.

Mr. LILJEQVIST. Q. As a matter of fact, for a great many years the water of the lake backed up to the Neal meander line, and in many places onto the deeded land south of the meander line along the shore, didn't it?

A. I will tell you, that is kind of hard to tell how far that water might back up on the lake onto the deeded land, for this reason, that the water from the Blitzen River flows over that deeded land. Now, our land in that locality is all watered by the waters of the Blitzen River.

Q. The trouble is for years that you have been a little afraid that if the water backed up to this (Neal) meander line you might lose your land; isn't that correct?

A. No, sir.

Q. Are you telling me that you do not claim any riparian rights, or any water proprietorship by reason of the backing up of the waters of the lake around your husband's land?

Mr. BLACKMAR. Just a minute. The Government has stated that there is no litigation involved in this case between the Government and the State of Oregon and any private individual; and I do not think Mr. Liljeqvist should at this time attempt to interject into this case an issue that is not here. We can not try the water rights of the Blitzen River in this case.

A. Well, I will state this: We haven't got any meander line on those lands that we now live on; that is all deeded land, and there is no meander line to it.

There is patented land below us and our land does not border on the meander line. Mr. Smyth has 57 acres, or something like that, of deeded land just north of our north line. (R. 862.) He is on the (Neal) meander line.

Mr. LILJEQVIST. Q. Now, from your observation when you taught school, and otherwise, are you meaning to tell us that the water of the lake didn't back up to Mr. Smyth's north line?

A. I will tell you about that. I put in the fall, and the water wasn't there, and the hay crops were up, you see.

Q. In the spring it did come back in the normal seasons?

A. I didn't go over there in the spring.

Q. And then what you have been testifying to about how you rowed around there, and went around there, was in the fall and winter, when the water was at its lowest?

A. No. I told you that I was going to school, and I went to the Simon Lewis schoolhouse, but the place I went from was east of the Simon Lewis schoolhouse, and it might have been a little north. The country has changed a lot, and I haven't been over in that country for a long time, but I never did teach school and go in a

boat in my life. I just went that term. It might have been a month I stayed with this woman while her husband was away. I didn't go to my father's property.

Q. And it was in that month of the fall that you have been testifying about?

A. No. it was in the spring. In the fall I taught in the Sodhouse district. (R. 863.)

There were waters in the springtime in the (Malheur) lake, of course; the people would not have had any lake to boat upon; and there were tules and grass and hay everywhere.

The water went high enough in the spring so that it flooded and we got a good hay crop. And we had lots of water in the Blitzen River in those days. I have seen on the Blitzen River where the water would go clear over the top of the dam, and you couldn't see the dam at all. Of course, you knew it was there, because it made a high place in the water, but you couldn't see the dam at all.

Mr. LILJEQVIST. Q. And you know from your experience in reference to your husband's land up there in the Sodhouse Field, and section 15, that the reason you have not been getting a lot of water is because they have been putting it on a lot of sagebrush 32 miles east of Blitzen, don't you?

A. No, sir. That makes a difference. We haven't had the moisture we used to have.

Q. As a matter of fact, the Pacific Livestock Company have been up there taking a lot of water, and you have had several lawsuits to force them to let the water down, isn't that correct?

A. We never had a lawsuit with the Livestock Company, but they are taking more water than they should, and putting it (R. 864) in a sagebrush field.

When the water goes on the Big Sagebrush Field it doesn't come down to the lake.

In 1920–1931, the water from the Blitzen (River) overflowed the lands and got on our land until it made it very disagreeable to everybody. We had a lot of water and it came in February.

I don't remember so much about 1922, but I remember in 1921 the water came up on the ground between our place and that bridge east of us there, just this side of the spring. The water backed down to the deeded lands in that spring. I went down to visit my sister; we met mother and father who had been away; when we went we had to hitch a team and wagon to our car and pull it through the lane because the water got so high up it made the lane soft and muddy; you could feel it drag in the mud on that road when we took it out of there so that I could get to Crane and take the train to meet my mother and father. (R. 865.)

Redirect examination:

The tonnage of hay placed into stacks depends upon the crop. We sold one stack of hay one time that had 111 tons in it; this year

our stacks were very light, some did not have ten tons in them, not more than that. If we had plenty of water to make plenty of hay, it would go from 50 to 100 tons, but most of them don't put up a 100-ton stack; they are from 50 to 80 tons, along there; 80 tons is considered a pretty big stack. 30 to 50 tons is considered the size of a stack. (R. 866.)

Recross-examination:

Mr. LILJEQVIST. Q. And if after the hay has been put in stacks, as I understood yesterday's testimony, upon the water running out, it was just as good as if there had never been any water on the hay?

A. I don't know. We were never bothered in getting so (R. 866) much water around our stacks. We always put ours on knolls.

My husband's home was on the deeded land, but my people, when they lived there in that log house, that was unsurveyed land, and it was overflowed in the spring. My folks always cut hay as long as they owned that place.

Mr. LILJEQVIST. Q. Let us see how high that place is. What place is that? Let us get it identified by Mr. Pecore on that map. We have some levels around here, and maybe that will help us.

Mr. PECORE. That is the place you described to me?

A. Yes; that is the one.

Mr. LILJEQVIST. Is that on that island out here that the levels of the Government show is 95 (4,095) feet? Is that where you put your stacks and cut your hay?

A. Yes; it was right in there somewhere; I don't know exactly where it was.

Q. And all around that so-called island was water in normal seasons?

A. As to normal seasons, I can't say as to that, because we had so many different kinds of seasons that they were not all alike. (R. 867.)

Mr. JOSEPH LOGAN SHIRK, called as a witness for the plaintiff, testified in substance as follows:

I have taken cattle by Windy Point in herds that ranged from 1,000 to 1,800 each; we estimated one man to the hundred head of cattle for active service with them. Previously to reaching Windy Point we would water the herd. In traveling in a day's (R. 939) drive, a short distance from what is known as Springer's place, or Sodhouse Spring, we swung to the left and came out into what my father designated as a foxtail area, sort of an island at times when the water would be high enough, because he figured he could water the cattle easier there than we could out farther west, where the lake was more of a slope and not a distinct edge; so we moved in there with the cattle to this place, and as I remember, there was a small embankment there probably six or eight inches high; but we were disappointed because the water did not reach the bank for several hundred feet, and we had to go out into the mud and slush even there and

water the cattle; then I rode out half or three-quarters of a mile into that (Malheur) lake to be able to dip up water in my hat to drink, without getting muddy water. When I got back I got the very dickens from my father for wearing my horse out wading through the mud, and if you knew my father you would know that he did a pretty good job of scolding me. We were passing there in the spring of the year; it was a spring delivery of cattle into the northern country for the summer feeding or pasturing. (R. 940.)

I was in that country previously with cattle in 1897, but I am not sure whether this particular trip I have been speaking about was in 1904, or previous to 1897, but I am inclined to think it was in 1904 or thereabouts.

In passing by that particular place in other years I have had occasion to observe the water there and with reference to the little bank that I spoke of up near Windy Point, I should judge that there were times when the water was farther out from that bank than at other times; but the nearest I ever saw the water to that bank was two or three hundred feet; possibly I didn't observe it very close; I was looking more to the cattle getting stuck in the mud. If the cattle went down and were weak enough we had to pull them out; as I remember there was quite a strip of land between this little bank. I had rather a cranky horse, and I took him out to that bank to get an advantage in getting on. (R. 941.)

I have had considerable experience while working with cattle in losing them in the (Malheur) lake because of being mired down. (R. 941–942.) It is not necessary to have water over a cow's head for it to drown. The principal loss from water drowning is really a tiring of the animal out in the mud until she becomes so weak that her head will drop down and it is only necessary to have sufficient water to cover the ground in which she will rout her nose and head around until she becomes so worn out in being stuck in the mud that she simply weakens, her head goes down in the water, and she eventually drowns. If the water receded, she would starve to death, but she wouldn't get into that condition if the water was deep enough to swim, unless the bank is vertical, and then she might drown in high water.

The principal trouble with cattle that has happened in my experience, comes from them getting stuck in the mud and getting tired out.

With one exception I have not worked with cattle down through the tules of Malheur Lake. I was passing along from the Narrows, going over to the Sodhouse district when I met a man named Oliver, whom the people around the country knew (R. 942) as the man who killed Peter French; as we were travelling we came along to where some cattle were stuck in the edge of the mud near the shore of the lake; he and I pulled them out together with a couple of boys younger than we were. That was my only experience in that portion of the (Malheur) lake, except where I put the cattle in the water.

We did not lose any cattle at Windy Point. (R. 943.)

Mrs. JULIA ANN CLARK, called as a witness for the plaintiff, testified in substance as follows:

Myself and husband (R. 1006) during the period from the spring of 1899 to 1906 (R. 1013–1014) had a place just bordering on Malheur Lake; it was not on patented lands, but on unsurveyed land. I am not familiar with the (Neal) meander line, I do not know where it is, but I know that that place was called unsurveyed land. (R. 1004.)

My maiden name was Loggan.

The place that we had was known as the George Thompson place and it was located just south of the Herman Ruh place.

(NOTE.—The George Thompson place is located right south of section 31, T. 25 S., R. 32½ E. The north end of this property abuts on the Neal meander line and it extends south just about an even mile; that is, the land extends from the Neal meander line for a mile south into the bed of Malheur Lake.—Pecore. R. 1005.)

The WITNESS. There were improvements on that place when we moved in there, and they consisted of two houses. A small house that we used for a storeroom and then a dwelling house; there was also a log house bordering the (Malheur) lake edge, which we used for a granary; there was a shed barn that ran (R. 1005) north and south; I don't know whether it joined into the log building, or not, but it was right near it. It doesn't seem to me that the large house was a very new one; it was just a one-story building. I have been told that Mr. George Thompson, who owned the place, had built the house. I do not know who built the log house down at the other end of that place. (R. 1006.)

When we first went there there was just Mr. Clark and myself, and later we had two children and all of us continued to reside in that place. Before we took possession of it Mr. Clark's mother was there, and I was down there and spent one winter either in 1899 or 1900, while she was there. We sold the improvements on the place in March, 1906. (R. 1006.)

During the time that we lived in there we had the ordinary stock around any farm, we had some horses, but mostly cattle, and the largest of the latter were about a hundred head.

Mr. Clark cut hay on that place, but we did not raise grain or vegetables or anything of that kind and I don't know whether the neighbors did.

There was a road leading out to our place.

Mr. BLACKMAR. Q. And as you wanted to go to town, or to church, or to visit your friends, you used this road?

A. I didn't visit any friends. When we got in there we stayed until we came out. We were right there on the (Malheur) lake bed.

We did not have any way to go out of there but in a wagon, and I didn't (R. 1007) go in and out only when it was absolutely necessary. It was not always difficult to get out of there with a wagon, but sometimes it was difficult to get out of there with one on account of the water or mud. The opening or gate into this place (George Thomp-

son place) was in the northwest corner, and sometimes when the water was high we would have to go straight south, and then west to the building; other times when the water was low we could go from the corner of the tract where the gate was, diagonally across the place where the house stood or was built. I do not recall any time while down there that it was necessary for us to move out on account of the high water except two or three times in the spring of the year we would have a thaw, and Mr. Clark would make preparations for that, and put hay out on the high ground, and during this thawy weather we would have to move on the high ground and take our cattle there. We would have a second winter, and then the water would freeze, and we would take the cattle back onto the island again.

We were living on a ridge, and sometimes we would have what was called a January thaw in the wintertime, (R. 1008) and if we didn't get out of there when the ice was solid, the ice would get thin and break; they (the settlers) termed the ice rotten; we would take the cattle out, because we did not want to take them across the slick ice because of the danger of them becoming mired. After the January thaw we would have another or second winter, when it would freeze solid enough so that we could take the cattle back there through that miry part that ran diagonally through the field onto the road. Mr. Clark came and went by horseback, and the condition of the lake was such that he could get out and we were not marooned in there.

Mr. Sam Graves lived not far from us, in a southwesterly direction and farther down the (Malheur) lake. That place is the one that Doc. Graves lives in (R. 1009) now, the very same place.

(NOTE.—The Sam or Doc. Graves place is located in lot 3, section 35, T. 25 S., R. 32 E., north of the lake. It is a little north of west of the house that is on the Clark place.—Pecore. R. 1010.)

The WITNESS. I remember the Grout place. I cannot tell you where it is located, but it was farther down the (Malheur) lake.

(NOTE.—The Grout place is known as the Francis Griffin place, and is shown on the map, Plaintiff's Exhibit No. 3. It is about midway between the Neal meander lines on the north and south sides of Malheur Lake, and about due south of the line between sections 17 and 18, T. 26 S., R. 32 E., north of the lake; right in there. There are two houses on that property right in there.—Pecore. R. 1010.)

The WITNESS. In 1893, before I was married I visited the Grout place, and they were living there at that time and going about their ordinary household matters. I do not know whether they had stock or not; I was just there on a visit and I cannot tell you. My impression was that they just went down there for hay. I do not know for what purpose, but I think for hay. I visited them just the once. We got to their place in a wagon, and we had to cross a body of water to get to the house, which I said first was on the lake and I suppose it is yet. We just drove up to their house; that was in 1893.

I remember a family down there called Showen. I visited their house once when I was going from our ranch (R. 1011) toward the town of Harney.

(NOTE.—The Showen place is in lot 1, section 31, T. 25 S., R. 32½ E.—Pecore. R. 1012.)

The WITNESS. I do not know whether the Showens had some land south of them that they cut hay on, because I was not familiar with their land except to be at their house the one time. (R. 1012.)

During the time I was in there with reference to how the (Malheur) lake behaved, the lake would recede and go back, and the reason I can tell that it receded was because in the wintertime when they cut the water hole at the edges of the ice for the stock to water they would cut fairly close to the edge (R. 1012) of the lake, and as the water receded it just froze dry (solid); then they would have to go back farther into the lake and cut more holes in the ice for the cattle to drink from. In the summer time the water was shallow, and it was muddy and miry (in there). It was so miry and disagreeable to get to the water's edge, that they could not lead the teams to the water during the hay time. We had a well to water the horses from and they would put the water in a tub we had for that purpose.

Mr. BLACKMAR. In the springtime of the year, you got the high water, did you not?

A. We must have gotten it during the spring of the year, because we went down in August; and the water would be receding when we went in. It must have been. I never was there early in the spring.

We were not living there all the year round; we were there only part of the time; we were there in the summer and cut the hay, and then we went to our other place. I was not there during the spring months. I was there on and off from 1899 (R. 1013) to 1906. There was one winter that I was not there for maybe two weeks but I was there off and on during the rest of the time.

Mr. BLACKMAR. Q. When you came back there at the haying season, at any time did you see any evidence that the water had been over the floors of your house?

A. Oh, no.

Q. It never got up that high?

A. No. (R. 1014.)

Cross-examination:

Mr. LILJEQVIST. Q. How far was your house inside of the Neal meander line?

A. All I know about the Neal meander line is just what I heard Mr. Pecore say now that it was a mile north of our place, and our house was, I should judge, 100 feet—maybe a little more or a little less than that from the water's edge; it was right on the water's edge. (R. 1014.)

To the best of my knowledge we were located about a hundred feet inshore from the south line; the north line of the property was on the (Neal) meander line.

SPECIAL MASTER. And her south line was about a mile below?

Mr. PECORE. Yes, according to the way the property is now.

The WITNESS. I do not know whether the house was as far down as the fence, but it was perhaps a hundred feet from the water's edge; it might possibly be more or less than that. I do not know the acreage, nor the length of the north and south fence line. (R. 1014–1015.)

I have been told that Herman Ruh's house was on patented or surveyed lands, but I really do not know. Herman Ruh's line was our north line, and our house was on the water's edge of the lake, but I do not remember just exactly how far it was. There was a slough in between the Herman Ruh line and our place.

Mr. LILJEQVIST. Q. You only went in the fall, as I understand, and the winter?

A. No, we went down there to cut our hay. (R. 1015.)

We cut our hay in August.

Mr. LILJEQVIST. Q. You were not there in March, April, May, June, or July?

A. Yes, some years when it was a late spring, I think it would be as late perhaps as March, and maybe April, before we had to move out there. If there came a second winter, we would move back in. I think we stayed in there until March, but I may be mistaken with reference to that.

Sometimes when we had the January thaw we moved out to higher ground, then if that slough froze over again we would go back and stay until the break-up came and the ground got so that we could go home. Then when the break-up came we would move to our other home at Harney; then we would not come back again until the haying time. When we moved out in the spring we came back to feed to the cattle the hay that we had put up in the summer months. (R. 1016.) Generally the earliest month that we took up our residence there below the (Neal) meander line was August, and we would stay there in August and September and perhaps we would have the hay all put up before October and then we would more back to Harney; then we would move back again to feed the stock in the fall of the year. Sometimes it was dry, and we could get in there earlier than when the slough was overflowed. Then we came back in the fall of the year to feed our cattle, but I could not say what month, unless I could associate it with something. Perhaps it would be in November; then we would stay there until March or April, when we would have to get out again in the spring of the year. (R. 1017–1018.)

Mr. LILJEQVIST. Q. Now, when the spring of the year came, where did the water come with reference to Mr. Ruh's south line?

A. Do you mean the water that was between our place and Mr. Ruh's?

Mr. LILJEQVIST. Yes.

A. Which slough do you have reference to?

Q. Well, you knew where Mr. Ruh's south line was, didn't you?

A. Yes.

Q. Now, in the springtime, do you know where the water came with reference to his land?

A. I don't think it would come any more than the lower part of his land. I don't know whether it went on his land or not.

I am sure I do not know whether or not the water went onto his deeded land. I rather think it did come to the lower part of his land.

I cannot tell you if there is any difference of vegetation that grew below Mr. Ruh's land to the south and north of it, such as tules, wire grass, and sugar grass. (R. 1018–1019.)

I am not familiar with the water out there at the Showen place.

Mr. LILJEQVIST. Q. Do you know how deep the water in the springtime came on Mr. Ruh's land?

A. I don't know that it came onto the south side of his land at all.

I do not know about the water on Mr. Ruh's land. I know the water crossed our place.

I do not really know whether we were on an island. It was a ridge, and I never followed it on the west side and I do not know whether the water extended from the west side back to the lake or not.

I haven't been back there since I moved away, but they tell me the buildings are all gone except the log building that was used for a granery, which I am told is still there.

Mr. LILJEQVIST. And you claim that is the place marked "house" on this map (Plaintiff's Exhibit No. 3)?

Mr. PECORE. Yes, sir. (R. 1019.)

The WITNESS. It is south and a little bit west.

I do not know whether that place where we had the house was entirely surrounded by water for several months in the springtime, because I was not over the ground right there west of the house—down at the corner of the lake.

We always raised hay on the ridge where the house was. The water was never over the ridge. I do not think it was ever over it.

Mr. LILJEQVIST. Q. How did you raise crops on it then?

A. There is moisture. How do they raise crops on the lake? They haven't any water there now, and they are raising crops.

On that place we cut sugar grass, and down near the slough we cut wire grass and some sugar grass also. (R. 1020.)

I have no way of estimating how much higher the house was where we had it on that ridge as compared to the lowest point I have seen the water in that vicinity. (R. 1021.)

Mr. JOSEPH WILLIAM CLARK, called as a witness for the plaintiff, testified in substance as follows:

Subsequently (in 1899—R. 1037) I bought a place from my mother and that is the place that Mrs. (Julia Ann) Clark has just referred to on the (witness) stand. It is the old George Thompson place.

My mother at one time lived on it, and I lived at the home there and fed the cattle on it. There were houses and improvements on the property, when I bought it from my mother, but I do not know when they were built. On the place there was a shed barn, a log house made into a granary, a double box house, about 14 by 16; we lived in one room and there was a little room west of that that we used for a store, a little cabin. (R. 1028.) We did not have any of that ground sowed in grain at the time my mother lived there.

Mr. BLACKMAR. Q. Where did this place get the name of the granary?

A. They claim that George Thompson planted it, and sowed and raised grain on that land before my mother bought it.

Q. To raise barley?

A. To raise grain.

That log house was known as the granary when I moved there. There was some shell grain in there, when I went there, but the mice ate the place out. When I moved in there with my mother I did not see any evidence of any stubble showing that grain had been planted. It might have been plowed two or three years before we bought it, I don't know, but there was no stubble there.

Mr. BLACKMAR. Q. Could you tell whether or not it was plowed ground?

A. By mowing over it, and looking at the land after we mowed over it, it looked as if there were furrows like someone had turned the sod over, and it was rough to mow. (R. 1029.)

We do not plow in the haying operation for wild hay. You would not have much hay if you plowed it. That part of the field that had been plowed produced wire grass and foxtail as well as the part that had not been plowed. That is the only place that I ever farmed down there.

I have taken farming implements in there on a little flat bottom boat that was on the ranch when my mother bought the place; who left it there I could not say. I do not know whether it was Mr. Thompson or somebody else, but at any rate, it was there when we bought the place.

Mr. BLACKMAR. Q. When you got ready to take your provisions and implements in, from what town would you start with this scow?

A. Well, we would start from along towards where the gate is, almost north of the house.

Q. About how far north of the house?

A. I should judge it was about half a mile; but the way they have it marked there on the map (Plaintiff's Exhibit 3) why, it is quite a lot farther than I thought it was. I only thought it was about half a mile by looking and guessing at it.

Q. How would you get your machinery and provisions down to the point from which you started?

A. I hauled it on a wagon.

Q. And then you would bring this scow up there to that point and load these things on the scow, and then how would you get it down to your house?

A. With Mr. Ruh's horses. Our horses were not very good in the mud; they weren't used to the mud; our horses wouldn't pull it through the mud. There was a little water, but it was awfully miry, and our horses were not good in the mud, and they were not used to it, and so we got Mr. Herman Ruh to take his horses and pull it across almost half a mile over to the ridge.

Q. That is, you mean he hitched onto this scow?

A. Yes, sir.

Q. And pulled it down through the water and mud?

A. Yes, sir.

Q. Just the one year?

A. Yes, sir.

At one time I went down to get in there (the old George Thompson place) and Mr. Ruh locked the gates, he wanted to take the place and he wanted the hay, so he locked his gates out on the north side of his place and would not allow me to get down through there to get to (R. 1031) my place; he also sent his hired man to jump the ranch. When he locked the gate, and told me that I couldn't get through, I went around back to Sam Graves' place and stayed all night; and the next morning I got Mr. Sam Graves to take us into the ranch in his little flat bottom boat. We could not go in a direct line from Mr. Graves' place over to our place, we had to get out into the water from his place south a ways, then we would have to turn north and south quite a little ways; we would have to dodge to get in between the patches of tules to get down south of my place, then we turned and rowed backwards through the open places in the tules until we got up close to our barn, and then we stopped there. Mr. Graves carried my wife and his sister to the shore, and I carried the two children. We waded through the mud and water. I never measured the depth of the water, but the water and mud struck us just above the knees and it was not very easy walking. (R. 1032.)

A man carrying a load would know he had been in the mud.

Mr. Ruh's hired man stayed there that day, then Mr. Ruh came to Burns and saw a couple of attorneys and came back and told me that the gate was open and I could go through at any time I wanted to; he took an attorney for one side and an attorney for the other so that he had to pay both of them. He put himself in my boots he said and hired one attorney, and then he hired an attorney on his own side. He told me that the gates were open and I could go through any time that I wanted, and he never bothered me any after that. He was a generous old fellow.

Since the first time I went in there with my mother, we cut hay every year. Some years we got more than we did in other years.

(R. 1033.) I do not know the greatest amount of hay that we put up there in any one year. We cut over 100 tons of hay on the place, but I could not tell you how many acres that it was cut off because we patched around considerably in those little places where sugar grass and wire grass would grow; we would have a little patch of four or five acres here, and another one over there. We would cut those patches out and then there would be tules, then we would go over and find another patch and cut that; then we would cut the ridge. I have no idea how many acres there were, would not attempt to say because I should be guessing; the survey doesn't correspond very good, they (the surveyors) have the correct measurements and mine were just by sight.

Since the first time I went in there with my mother, I did not remain in there for a full year. While I was there living with my mother, I came out certain seasons of the year. It varied as to the time of the season we came out; sometimes it would be in February, sometimes in March; we would have to come out and stay out. (R. 1034.)

I have heard Mrs. (Julia Ann) Clark's testimony upon the seasons that we were in there, and that is about as near as I could give it, and I do not think that I can improve upon it.

Cross-examination:

At times we would have to move out of there on account of the water. At that time I did not know where the Neal meander line was, but now I do. The south line of Mr. Ruh's land was the north line of my place.

Mr. LILJEQVIST. Q. And how far south of that did you claim?

A. To the lake edge—to what we called the lake edge, right on the border of the lake.

Q. From Ruh's land, down about how far in distance did you claim?

A. I guess it was half a mile straight down from Ruh's fence to the house.

Q. Now, if the survey shows lands down there now that have (R. 1035) been used, it is possible that more lands were put under cultivation, isn't that correct?

A. It might be to the south of the house. I do not know how far south of the house it was.

The house was located on a long strip of land, and I don't know how long it was. I never followed it from one end to the other.

Mr. LILJEQVIST. Q. How high above the water was it when the water was at its lowest?

A. Well, when the water was at its lowest, it was a little lower than when the water was at its highest, but I could not estimate the height of the thing. I never studied that. I never went to see how high it was. I could not tell you.

I saw the south line of Ruh's place all under water. I do not think that every spring the water came up and flooded Ruh's land;

I would not say that it did it most of them. I saw it up there, and I saw it when it didn't reach it. I would not attempt to answer that. (R. 1036.)

I was not there in 1889. I was there in 1899 when my mother bought the place; that was when I went in there with her. She occupied the place three or four years before I bought it from her, which was about 1903.

Some years there was a considerable amount of water in the spring-time between our place and the Ruh place.

The reason I did not stay down there all the time was because I did not have range for my cattle there. The water did not force us out. We could have lived on the island in the spring, but we could not keep stock there. (R. 1037.)

In the fall most all of the islands extended out to the (Neal) meander line toward Ruh's. There was no water only in some years and the island would extend itself out to the meander line. I do not know the acreage of the island, but it must have been three-quarters of a mile long and 100 yards wide on some places; and maybe a couple of hundred yards wide in other places. I have not any idea.

The water came up and that was what raised the crops on that island.

Mr. LILJEQVIST. Q. Isn't it a fact during the ordinary season there when the water was in the lake, and backing up the lake, that the water went out to the Neal meander line, and also permitted Ruh to raise some crops on his surveyed land?

A. Why, yes, as you call it. Of course, there were no two years that I saw alike; but as you call it, yes. When there was sufficient water in the (Silvies) River to raise the (Malheur) lake, why, it would overflow the banks, and flow down across Mr. Ruh's place and Mr. Showen's place and back on from there, and it would be clear from there to the lake, running on down to the lake, and back (R. 1038) around those sloughs.

Q. When the (Silvies) River quit running down there, didn't the lake back up?

A. No, sir.

Q. Didn't you make this statement (to the attorney representing the Government at the time he interviewed you in answer to this question, propounded during the interview):

"Q. Since you have been there, in the high-water period, say between March and June or July, has the water area, that is, the stand of water, reached what is now the second meander line? I don't mean exceptionally dry or wet years.

"A. Yes; it would. When I lived down there it extended beyond that meander line.

"Q. How long would it be there?

"A. Two, three, or four months.

"Q. The rest of the year it began to recede and go down?

"A. Yes."

Q. Isn't that what your statements (when you were interviewed) were?

A. Yes, sir.

Q. And is that statement correct?

A. Yes, sir; I think it is.

Q. Isn't it a fact you couldn't get in there in June ordinarily on this island without going in a boat?

A. I think it was ordinarily while I was there. If we went in in June, or May, you would have to go in a boat; that is, unless you waded it.

I did not have more than one place in there. I used the boat there one time, I believe, and I went out a little ways with my brother, and he shot some ducks. (R. 1040.)

I sold out to Jess and Lynnie Vickers. I do not know that they have enlarged the area. I have not been down to that ranch for 25 years.

Mr. LILJEQVIST. Q. Now, if Mr. Pecore's map (Plaintiff's Exhibit 3) shows a bigger area than you remember, the chances are that it has been enlarged by some other settlers.

A. The lake may have dried up, or it might have been enlarged. I was just guessing at the distance. (R. 1040.)

Redirect examination:

There is quite a large area on the north side of Malheur Lake outside of the meander line which is watered from the Silvies River; the water gets on that area before the lake rises.

Mr. BLACKMAR. Q. What about Ruh's place—does he get his water from the Silvies River, or does he get it from the lake?

A. He gets it from the Silvies River.

Mr. BLACKMAR. In connection with Mr. Clark's testimony, I desire to call attention to the fact that Plaintiff's Exhibit No. 3 shows that the elevation of the house (the old George Thompson place) is between 4,094 and 4,095 feet. (R. 1041.)

Mr. CURTIS E. ELLIOTT, called as a witness for the plaintiff, testified in substance as follows:

We never pastured any cattle in the west end of Malheur Lake, but the cattle would stray away and go in there a good many times and in order to get them out we had to ride in there to get them. (R. 1050.) Never went in there on foot because I was not much of a man to walk; I went on horseback most of the time. People in that country don't walk very much if they can get out of it.

I have been on Harper's place, the Taylor place, and the Bert Simmons place. There are a good many Hayes around there. There is a Hayes that lives up there, and there used to be a man by the name of Hayes who lived below the Sodhouse. I knew Mr. Bennett. Those people lived on places up there in the west end of Malheur Lake at the time I was living down there at the Narrows. (R. 1051.) They used to cut hay and they had a few stock. I knew Pinto Tom,

Scott Haley, and Red Campbell, and all those fellows lived in the west end of Malheur Lake. (R. 1052.)

Mr. ROBERT DILLARD BAKER, called as a witness for the plaintiff, testified in substance as follows:

In the spring of 1890 (R. 1074) we took a bunch of yearlings down past Saddle Butte, and stayed all night at Windy Point. Then we went on to Anderson Valley. I think we watered the stock up in Malheur Lake there as we were coming down; there was water all along, but we didn't have any particular place to water them. We kept the cattle as near the road as we could.

I guess the water of Malheur Lake was a quarter of a mile from where we took the cattle; but there was water at different places where we drove the cattle along the old road. The water was mostly in low places; the ridges were dry. (R. 1075.) I could not say whether the water was going into the lake in those places, or backing out of the lake. I think the lake connected up in some places, but at others it was just standing on top of the ground in pools.

I don't remember how many cattle we had in that herd, but from the number of men there were we had something like a thousand head, maybe not so much but there was quite a bunch.

For the next four years after 1890 I was back and forth there at the company's ranch (the Island Ranch), first at one place and then another during that period. I used to pass Windy Point with freight teams and in all different kinds of ways. With the freight teams we would haul six or seven tons; that was the biggest team I drove (R. 1076); we had six horses. We had no trouble getting stuck in the mud at Windy Point, but I got stuck up there at what they call the Nine Mile Slough; I think that was in June. When I went down, the Nine Mile Slough was a pretty good river, but I can not say whether it would run into the (Malheur) lake because I was not there where the mouth of it goes into the lake, but it was flowing toward the lake where I was camped on it, north or northeast of Saddle Butte.

The times I have passed Windy Point I do not think I have seen the (Malheur) lake at the same place. (R. 1077.) It would be pretty hard to say that I have seen it in the same place twice in succession.

I do not think that I have seen the water of Malheur Lake at Windy Point over that little reef that is out there, the one that comes up about two feet. It seems to me that that was a quarter of a mile, may have been more or less. I do not think that I have seen the water there at Windy Point more than 150 or 200 yards back from that reef; I never measured it. Sometimes distances look farther than what they are. I never was at Pelican Island and I do not know whether there is any reef between the little reef in the vicinity of Windy Point and Pelican Island. (R. 1078.)

I have not cut any hay down in that country, and I have not been down there shooting or hunting. I have seen lots of stacks of hay in

that country below the Island Ranch. I have been down as far as the Sodhouse Field, that is on the Narrows side, I have seen stacks of hay out in that field. (R. 1079.)

Cross-examination:

I do not know how much water there was down there at the time.

Mr. LILJEQVIST. Q. Now, this bank at Windy Point, there is a bank at the present time described in the testimony as being about a mile westerly of Windy Point. Now, is that the bank you are referring to that you saw, or was it one closer in?

A. I suppose that is the one. I haven't been there for several years. I seen it the first time I was there; and that one bank out there I saw.

There was an old road that goes down pretty close to the water, and that is the bank that I am referring to and I should judge that the old road is about a quarter to half a mile from Windy Point. I have never seen the water over that old road. That old road is the one we were travelling over with the cattle. (R. 1080.) That might have been in 1890 or a little later, and it was in the spring of the year about the first of April. (R. 1081.)

I went along there again in the nineties. (R. 1081.) I cannot say how many years, but for six years I think. Every time I was down there in the nineties the water was pretty much the same, as near as I can remember, the last time I drove past there I think it was about 1897, and there was quite a bit of water there.

I do not know whether the water went over that bank. (R. 1082.)

Mr. JOHN H. WITZEL, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I think the water runs down from the Blitzen River whenever it is high in high water, and overflows the John Marshall place and the Simmons place. The (Malheur) lake backed up onto them. (R. 1121.)

I know where the Neal meander line runs along by the Reinemann place and through in there, and the water crossed that line, and some years ran to the other 1877 meander line, or about.

Mr. LILJEQVIST. Q. In your judgment, Mr. Witzel, when you first went into the country from '95 on, did the water at ordinary high periods in the spring of the year go up to the Neal meander line in front of the Reinemann place?

A. I think it would come probably, on an ordinary year it would come to the meander line. (R. 1122.)

Mr. LEROY BUNYARD, called as a witness for the plaintiff, testified in substance as follows:

I am familiar with the granary that was on the George Thompson place. In the fall of 1893, I think it was (R. 1151), I helped move that granary from his Cow Creek ranch; it was a log building; we

took it down and moved it down there and placed it on the (Malheur) lake; we took it down a piece at a time, and took it down there (to the lake) and put it up again. We loaded it on a wagon (R. 1150), then we went right around by Lawen and close to the old Adam George place and right through the lane right straight down. We did not have any trouble getting down on it (Malheur Lake) until we got on the inside of Mr. Thompson's field, and there was no water in the channel; it was pretty soft and we got through by unloading half of it and making two trips across the ridge to where his house was.

SPECIAL MASTER. Did you take that house and dismantle it before——

A. (Interrupting.) We dismantled it; yes.

(NOTE.—The George Thompson place lies south of section 31, T. 25 S., R. 32½ E. That would be a house that is shown about 2½ inches on the map, Plaintiff's Exhibit No. 3, south of the Neal meander line. I think Vickers had it, and Ruh has the place now.—Pecore. R. 1151–1152.)

The WITNESS. Mr. Thompson raised grain down there; he planted oats.

Mr. BLACKMAR. Q. At the time you were going down there—those years when you were going down to the Thompson place, were there some other settlers in there near Thompson?

A. Yes; there was Mr. Adam George, and I believe Mr. Herman Ruh was there, and Bob Ivers.

I don't remember the name Cunningham. I remember Scott Haley was there; Jason Bennett I believe was farther west, quite a ways towards the Narrows. I cannot recall if Ed. Grout was there at that time or not. (R. 1152.)

Where Mr. Ivers lived he raised some grain; I think it was in 1893 or 1894.

Mr. BLACKMAR. Q. And these other people I have mentioned, at least some of them you knew, and they were living down there at that time, were they not?

A. Yes, sir.

And they put up some hay and lived there with their families.

The first crop of grain that Mr. George Thompson raised, he cut it for hay, because the blackbirds ate all the grain out of it, and the second crop he threshed that, and I helped him stack the grain, but I cannot recall whether that was in 1894 or 1895. Mr. Bob Ivers bound it with his binder, which we had in there. (R. 1153.)

Mr. BLACKMAR. Q. Do you know how that binder was gotten in to Thompson's place?

A. Well, he came in with it through—the way we fetched the log cabin in—the log house.

Q. The way you brought in the log cabin; did it seem to be a pretty well-defined road down there?

A. Yes.

It was a plain road. I was not there when the oats were threshed; I cannot recall what kind of a machine he used.

Mr. BLACKMAR. Q. Did you ever see anything around there that looked like a threshing machine?

A. No; I was backwards and forwards from Cow Creek, and I wasn't there when the grain was threshed, but I helped stack it. I will never forget that, because it was full of foxtail, and foxtail isn't very nice to work in.

Q. It kind of gives you the itch. Did these people who were down there around Thompson who put up hay, did they cut it by hand, or did they have some kind of a mowing machine they used on it?

A. They cut it with a mowing machine.

Q. And used one of these rakes that is drawn by horses?

A. Yes; but the first crop of oats that he raised I know (R. 1154) my father tried to cradle it. You know what a cradle is?

Q. Yes, I know what a cradle is.

A. And it was so tall he could not do anything with it. He had to cut it with a mowing machine.

Mr. BLACKMAR. I don't want you to understand I claim I can swing a cradle, but I have seen other people do it. (R. 1155.)

Q. Back there in the nineties, what season of the year did they usually cut their hay? Maybe a little more accurately, what month?

A. Well, it just depends upon how fast the water recedes. Sometimes they would cut it along the last of August, and I have seen them cutting down there the first of October.

They got just the one crop. (R. 1157.)

Cross-examination:

The time we did our hunting right there where the Silvies River ran off into the south of John Gregory's place at the Sand Reef, covering about two miles, possibly a little farther, there were channels through the tules there in different places. (R. 1159.) Once in a while we had to go through a bunch of tules where they were scattered and not thick, but mostly had an open channel. (R. 1160.)

Mr. LILJEQVIST. Q. Once in a while you found in the channel a few scattered tules, and you went through them?

A. Yes; there were tules on both sides of the channel.

The channels are places where the tules don't grow; just an open channel; the water in the open channel would extend out through the tules, and the water would be at the same height through the tules as it was in the channels.

Mr. LILJEQVIST. Q. And in your judgment about how high was the water ordinarily above the roots of the tules? They grew in water. How deep, in other words?

A. It varies. Of course, when the water was high, it was probably a foot or twenty inches, the water was above the roots of the tules,

and again in the fall, there was places it was practically on the level with the roots of the tules. (R. 1160.)

I do not know what the rise and fall of the water of Malheur Lake is in the spring and fall. I never measured it; don't know just what the conditions would be. At the Thompson place, that was where we noticed it the best of any place, the high water came pretty well up toward the ridge, and then it receded in the fall, and it was probably 100 yards or so out, depending upon the season, what kind of a season it was. If it was a real wet season, we had more water; if it was not wet, less water.

Mr. LILJEQVIST. Q. How much was the vertical rise and fall of the water, in your judgment?

A. Well, I presume it would be there—I believe it would be probably a foot—it would fall a foot during the dry—that is, the hot season—the dry seasons when these waters (R. 1162) were evaporating from the high water mark in the spring of the year.

I went in there in 1893 (R. 1147, 1163) but I do not know anything about conditions before that time. As I understood it, the north line of the George Thompson place, running east and west, was the Neal meander line. I cannot recall whether that was the south line of the Ruh place; I don't think Ruh owned it at that time, but he became the owner of it later.

Mr. LILJEQVIST. Q. Where did the water come with reference to that line on the north side of the George Thompson place in the springtime?

A. Well, the water came there from the Silvies River in the channel. It ran around there on the north side of Mr. Thompson's house, and it got pretty deep, but I don't know whether it backed up to the (Neal) meander line or not. There was quite a lot of water in that channel.

Q. You don't know one way or the other?

A. No.

Q. You don't know whether the lake backed up from a foot (R. 1163) to four feet on the Ruh (Neal) meander line, or not in the springtime?

A. No; I couldn't say.

When I was down there in Malheur Lake in 1893, Mr. Ivers, Mr. George, and Mr. Thompson were living there in the northern part of the Malheur Lake. I can not recall at what time Mr. Thompson did move down there to settle. They usually put their cabins in the highest places they could find. They usually cut a little hay most every year when the water receded, and many a time they could not cut until October. (R. 1164.)

Mr. FRANK CATTERSON, called as a witness for the plaintiff, testified in substance as follows:

When I got to be fifteen or sixteen years old (about 1898), about every year I was on the northeastern part of Malheur Lake. (R. 1182.)

I did not have any hay lands inside the (Neal) meander line on Malheur Lake, but I have cut hay there more than once for Mr. Charles Peterson; I have hayed for Mr. Herman Ruh and Sam Graves and John Graves.

I have been around Mr. Haley's place, but I never worked for him.

I know Mr. Jason Bennett, but I do not know where his place is.

I know of two Hill places, the Joe Hill place is where Mr. Huffman is now.

I know where the George Thompson place is. (R. 1183.)

Mr. BLACKMAR. Q. Since you have grown up and become familiar with those places, can you tell me whether or not during the past, say, 30 or 35 years, they have cut hay in there nearly every year?

A. Yes, sir; they have, most years.

In cutting their hay they used mowing machines and horse-drawn rakes. I have had occasion to take machinery of that kind into some of those farms. I hauled it in there by wagons and horses.

I know Red Campbell's place down in there. And like the other people, he has cut hay there earlier.

The hay that is cut down there in the lake beds is stacked right there on the ground. They feed it out to the cattle usually in the winter. The hay is hauled out from the stacks and fed right there by (R. 1184) the stacks, outside. They built wire fences around the stacks to keep the cattle out. The cattle are fed at different distances from the stacks; some feed right outside, some farther back away from the corral. It is not hauled away to some other point and fed there, but it is fed right on the ground. (R. 1185.)

Cross-examination:

I do not know whether there was much hay cut down there before 1887. (R. 1187–1188.)

There were years when those people in there could not cut hay on account of the water.

I know about where the (Neal) meander line is around the Herman Ruh and the John Graves places. (R. 1190.) Some years the water came above that meander line.

Mr. LILJEQVIST. Q. Well, normally, where did it come? In the ordinary years, did it come up to the approximate vicinity of it?

A. Well, I don't know what you mean by normally. The water varied a lot.

Q. Around that vicinity how deep or how broad was the expanse between the normal high water and the low water of the year? Below the meander line in the Ruh place and the John Graves place?

A. Quite a lot. Some years it was pretty nearly all over it, and other years it was drier.

Q. How wide did it go between the high water and the low water?

A. Well, it went quite a ways. (R. 1191.)

The water in the springtime came up quite a ways along in sloughs of where the old town of Lawen was subsequently built.

Mr. LILJEQVIST. Q. I mean in reference to the backwater of the (Malheur) lake.

A. I don't know whether the lake backs that far or not. The water came in from the other way, too. (R. 1192.)

At the time I went in a boat with Mr. Sebring about three-quarters of a mile south of the A. and C. Spurlock house (located in the southern portion of lot 5, section 19, T. 25 S., R. 32½ E.) the water of Malheur Lake was about all over that place at that time. (R. 1193.)

I have no land on the (Neal) meander line myself, but the estate still owns the place there (in the vicinity of the north end of Pelican Island.) (R. 1185.) I have been there during the last few years. Prior to the present existing dry period the water of Malheur Lake has been around that meander line for several years. Five or six years, if I remember right, I was around there, and the water was up there a number of times since 1920.

Redirect examination:

I have not had occasion to drive stock through Malheur Lake in the summer time, but I have in the winter time.

Mr. BLACKMAR. Q. Do you remember when it used to be customary to cross cattle from the Island Ranch and then come out about the Sodhouse Spring?

A. No; I don't. (R. 1194.)

Mrs. MARCELLUS B. HAYES, called as a witness for the plaintiff, testified in substance as follows:

On February 17, 1895, I moved down into the neighborhood of Lawen. I suppose you wonder why I remember that date. Well, Mr. Hayes and I were married on that day, and he naturally had to take me home with him. We went down there in a sled; did not have automobiles then. Around Lawen we lived 2½ miles east of the Island Ranch, or 3 to 3½ miles west of Lawen, and if there was any meander line around that place, I never heard of it.

In the spring of the year, from time to time we got water on our upper place; that is always irrigated by the Silvies River. (R. 1239.)

(NOTE.—The upper place (in section 34) was described by Mr. Hayes this morning; it is north of the north boundary of township 24, range 32 E., about even with Lawen.—Pecore. R. 1240.)

The WITNESS. We were about 2½ miles due east of the Island Ranch, and 3½ miles west of the old town of Lawen.

The old town of Lawen is about a mile south of the new town, or a mile south of where the store now stands.

SPECIAL MASTER. And Lawen, as shown on this map (Plaintiff's Exhibit No. 3), is the new Lawen?

Mr. PECORE. No.

SPECIAL MASTER. It is the old town of Lawen.

Mr. BLACKMAR. It is the old town of Lawen. (R. 1240.)

The WITNESS. We moved down there in 1895 and the railroad came through to Crane, Oregon, about 16 or 17 years ago, but I cannot be positive as to the date because I have no occasion to remember it.

Between our place and Malheur Lake, the people around that part of the country, the upper place, we all got the water from the Silvies River. I lived there for a number of years and there was no school near our place, and I would always have to move away to send the children to school in the winter. As I remarked to them in the past, there are very few hen houses down there I haven't lived in, and I lived right in the city of Lawen five or six years, if you would call it a city. I would call it all the way from three to five miles from the town of Lawen to the Malheur Lake proper. (R. 1241.)

Mr. BLACKMAR. Q. And the overflow from the Silvies River?

A. The overflow from the Silvies River, as I recall it (R. 1241) to the old store, it may have been quarter of a mile.

SPECIAL MASTER. That is from the point of overflow to the old store would be quarter of a mile?

A. From the Silvies River; it may have been a little farther or it may have been a little less. I never measured it.

SPECIAL MASTER. As Mr. Hayes has told us, you afterwards moved on this other place.

A. Yes, sir. We had that place rented I think for four years and we bought it in 1910, but we really had it rented the year we bought it, we bought it in 1910, in September. (R. 1242.)

I do not think there has ever been a year that we have not cut hay down there on that place, with the exception of the last two years, and we cut rye hay there this year. The hay we cut there we feed to our own stock.

Mr. BLACKMAR. Q. And where is your feed lot with reference to the posts of the (Lake Malheur) Bird Reserve; is it above or below?

A. Well, both places; if we were feeding a haystack that was above the Bird Reserve, we fed our cattle around that stack; if we were feeding a stack that was out on the (Neal) meander, we fed our cattle right around there.

Q. Would you say generally in every year that you have had stack of hay below the (Neal) meander line, or below the bird posts?

A. Yes, sir; I think we have.

I know pretty well myself the approximate amount of hay that is put into these stacks. Mr. Hayes and I never aim to guess how much hay with which we are going to go through the winter; we learned that to our sorrow, but it didn't pay, so we usually measure our hay, and I remember one stack had 96 tons in it; sometimes maybe some would have only 20 tons in it up on the higher ground, but you take it on an average of 50 tons, somewhere around there. (R. 1243.)

Mr. BLACKMAR. Q. How much hay does it require to carry a steer through the (R. 1243) winter?

A. Well, a steer, if it is going to fatten him, it will take more, but the way we always estimate the hay with our cattle is with a

mixed herd, and by a mixed herd, I mean cows and calves and yearlings and stock cattle—a ton to the winter. If we have sufficient pasture to go with that, that is the way we estimate hay for the winter.

We get some water on the northern part of our place from the Silvies River and seems to me that the neighbors right around there would get some of their water from the Silvies River because it flows through their place first. Mr. Ruh has a dam there in the immediate vicinity of our place.

Mr. BLACKMAR. Q. That is about how far from your house?

A. Well, it is half a mile from the house to Mrs. Mary George's desert claim, and we go through that; that is, maybe I would say 2½ miles, somewhere along in there; I could not tell just exactly.

Q. And then above that is this dam you speak of?

A. Yes.

I could not say how many years it has been there; they have had one there for years, the old dam wore out and they built (R. 1244) a new dam.

I could not say whether there was a dam in there when we first moved in there or not, but I rather think they had their old dam there then.

Mr. BLACKMAR. Q. Mrs. Hayes, during the years that you have been on this place, does the water come up to the same point every year?

A. No, sir.

Some years I have seen the water out beyond the (Lake Malheur) Bird (Reservation) posts.

Mr. BLACKMAR. Q. And some years you have seen it not quite up to the (Lake Malheur) Bird (Refuge) posts?

A. Well, where the (Lake Malheur) Bird (Refuge) posts are near the cabin, I never did see it up to this there, and the water, about the closest I ever saw the water to the cabin is, maybe, 100 yards, maybe 150, and there is a (Lake Malheur Bird Reserve) post right near the cabin there.

When we first came into this country, we settled about 3 or 3½ miles west of the town of Harney, on Soldier Creek; the town of Harney is on Rattlesnake Creek. (R. 1245.)

I could not say anything about Rattlesnake (Creek), we did not go there where it enters the Silvies River. I guess it changed its name before it got there.

Mr. HAYES. Harney City, the old place, is Rattlesnake Creek. That is the place she is talking about. (R. 1246.)

Cross-examination:

The WITNESS. As a rule, I think we put up more hay below the (Neal) meander line than we did above it.

Mr. LILJEQVIST. Q. And that is because you got more water on it?

A. I don't know; the water does not seem to pay any attention to the (Neal) meander line. It depended on the snowfall.

Q. The hay paid a lot of attention to the water, didn't it?
A. Surely it did. (R. 1246.)

Mr. JESSE O. ALDERSON, called as a witness for the plaintiff, testified in substance as follows:

Around 1898 and 1899 I did some haying down in Malheur Lake. I was down there in later years but I never hayed down there after that date.

The place I did the haying on I believe was called the George Thompson place, and Mrs. K. G. Tudor and her children were living there at that time (R. 1271) in a house on the property in 1899.

The two years that I was in there I cut considerable hay on that place. Mrs. Tudor had the usual things around her house that go with a home of that kind, such as tools and some stock.

I do not recall exactly how many tons of hay I put up in those two years. I suppose around 60 or 70 tons. The ranch is up on an island. They had a mowing machine to cut the hay with (R. 1272), and a rake drawn by horses. I took those implements in there with a team and went through the swamp, the tules, the water and mud; drove right through. We always took the implements out (when they were through haying) and returned with them to that place the following year.

Other people in the immediate neighborhood were also engaged in haying. There were Herman Ruh, Ausmus, Adam George, and several others that I do not remember now. Those people had similar machinery to harvest their crops that I had to harvest mine. (R. 1273.)

Cross-examination:

I do not know whether or not the Herman Ruh place was within surveyed land in 1898 and 1899. Mr. Herman Ruh was living there at that time.

I do not know whether the Ausmus place or the Adam George property were within surveyed land or whether they were unsurveyed lands. Mr. Ausmus was living there at the time.

I was on what they call the George Thompson place at that time (R. 1276); there was a small island there of about 100 acres; I do not know how big it was in the spring because I was not right there. I cut hay on that island.

Mr. LILJEQVIST. Q. Will you state whether or not it was the overflowing of that land on which you cut hay that caused the hay to grow?

A. It would be the (Malheur) lake backing up onto this land, I suppose.

Q. In your judgment, had the water that backed over the land that you subsequently cut the hay on anything to do with the cutting of the hay crop?

A. I think it had.

I could not say how many acres I cut the hay crop on, it might have been 60 or 70 acres, or something like that. (R. 1277.)

Mr. EDWARD ANDERSON, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I think there was some difference in that country at that time from when I first knew it.

I cut hay about a quarter of a mile in front of the Charlie Reed place in 1893. Afterwards I learned about where the (Neal) meander line was on that place. At the particular time I cut the hay on his place, the early part there, we did not cut much farther than about a quarter—just around in little places we cut, knolls and like that (R. 1287), at first around his house, when we first settled in there. Then as years went by we kept cutting in farther (north of Charles Reed's house) all the time.

I never went in a boat in front of the Reed place.

I think I know now where the Neal meander line is in front of the Reed place. In those days in the springtime the water came up to that meander line. (R. 1288.)

Mr. L. W. SHEPARD, called as a witness for the plaintiff, testified in substance as follows:

In 1895 when I first made an observation of Malheur Lake, I went over the country down there on horseback, to everybody's place, and different places, buying hides for a Mr. Clevenger, a man in Burns.

I went over to Lawen and down that way and around by the Narrows. I went across Malheur Lake that time, that fall, crossing somewhere from Scott Haley's place and south of there to the old Woodcock place, which was known as the Dunn place at that time.

(Mr. PECORE.—It is right north of Mrs. Dunn's residence; a mile out in the lake bed, and as far as we were ever able to find out, it was known as the J. Woodcock place.

That house is about quarter of a mile north of the meander line of lot 4, section 29, T. 26 S., R. 31 E., south of the lake. R. 1291–1292.)

The WITNESS. It was not much of a (Malheur) lake there at that time; it was mostly tules and a little ice. (R. 1291–1292.)

Mrs. Woodcock was living on that place in a house and they had some livestock and farming implements. I believe I bought a few hides from them at that time.

The lake was frozen over at that time and I had no difficulty getting there to the place. I believe there were one or two little open spaces where the horse could step across easily enough but they were not very deep, a foot perhaps. (R. 1292.)

I have never done any hunting there.

I crossed the (Malheur) lake again in the latter part of September or first of October, 1917 (R. 129[illegible]) for the purpose of building a house on the other side of the lake (R. [illegible]92) on the old Woodcock place for Mrs. Fred Haines, who owned the place at that time; it is the same

place I went to previously on horseback. I hauled a couple of loads of lumber; one of them I went with around by the Narrows, and the other load I took right across the lake. I left Burns here and went down the Hanley Lane to what I believe is called section 33, and from there on down past the Island Ranch. On the other side of the Island Ranch is what is called the Red "S" Field, and from there I went down past the oil well, or the artesian well (the water is warm) with some water troughs there. From there I went down past Scott Haley's place, past the west end of Red Campbell's place, right across the (Malheur) lake there over to the Woodcock place where Mrs. Haines was living at that time I was building the house. From the Red "S" Field down to the Woodcock place, there was evidence of wagon tracks there. There is a road that went across there, you know. It was not a public road, not a county road, I don't suppose, but there were several gates that went through the field. There had been quite a lot of travel through there. (R. 1293.)

In 1917 when I went down there, there were other houses between the Woodcock place and the Red "S" Field on my road of travel. Scott Haley lived in one; down the other side of the Red "S" Field there was a man by the name of Mr. Graves who lived there; Mrs. Griffin had a place this side (north) of the Woodcock field, but I do not know whether she lived there or not although there was a cabin there. There was another man staying there part of the time in his cabin, by the name of Sam Medwinter (R. 1294); he used to be a cook here in Burns.

Some of those people whose houses I passed had some fences around them and livestock. I also saw some haystacks around them; the haying season was mostly over (when I made that trip). (R. 1294.) When I was building the house there, I think the man who had the place then was cutting hay there at that time. The cabin that Mr. Sam Medwinter had down there seems to me was northwest of Red Campbell's place. I think his and the Griffin place joined, if I am not mistaken, but I am not acquainted enough with the country to make that certain. (R. 1295.)

Cross-examination:

There was not much water there to see at that time. There was quite a bit of water at places around the tules there, but not at that time, not that fall (of 1917) (R. 1296); it was dry clear across the (Malheur) lake. (R. 1295.)

Mr. LILJEQVIST. Q. That was one of eastern Oregon's very dry years, wasn't it?

A. Well, I suppose.

Q. Then that dry fall was the only time you really ever crossed the western part of the (Malheur) lake?

A. Yes.

About 35 years ago I was around Windy Point.

Mr. LILJEQVIST. Q. Where did the water come with reference to Windy Point?

I suppose it was a mile, maybe three-quarters of a mile, something like that; I could not tell you; it may have been a mile, more or less.

I did not try to go across the western part of Malheur Lake other than the time I have mentioned. I do not know how deep the water was in the tules or in the open places between the tules. (R. 1297.)

Mr. RICHARD A. SMITH, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

I was around Windy Point sometime in the nineties and I found water in Malheur Lake there. The water was about a mile or a mile and a half from Windy Point. (R. 1314.)

Mr. PAUL WARE, called as a witness for the plaintiff, testified in substance as follows:

I know of Mr. Jason Bennett, but I was not right at his place. I was at Mr. Lewis' place a number of times, and at Mr. Scott Haley's place, and at the times that I was there those people lived in their houses, and maintained their homes just like our folks did down on our place. I do not know how those people got in and out of their places. I do not think though, there was much of the time that there was water that would keep them from going in. I have seen water there, but I think most of the time they didn't have to cross much water. I have not seen a road that goes up into that part of the (Malheur) lake and I don't know anything about it. (R. 1324.)

Mr. WILLIAM HANLEY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I remember particularly the spring of 1894 that the water was up in the window of a house around south from the Narrows, known as the Reinemann house; the water was up in the windows of that house that spring.

Mr. LILJEQVIST. Q. That is the old Albert Reinemann house?

A. Well, Reinemann house.

Q. He is dead now, isn't he?

A. I think maybe he is.

Q. Well, from 1894 on, in subsequent years, where did you see the water with reference to that place? (R. 1384.)

A. I have seen it plumb dry a good many years since then.

I have gone back to that place in the spring of the year, but the water was not as high as it was that spring (of 1894). (R. 1384.)

Mr. GEORGE H. BOLLENBAUGH, called as a witness for the plaintiff, testified in substance as follows:

I have worked for those ranchers who have places up there in the west end of Malheur Lake. I have worked for Mr. W. J. Dunn,

Mr. Pete Caldwell, and I have helped my half-brother, Clarence Miller, over there sometimes.

I know where the Vickers place, the Griffin place and the Haley place are up in there. I became familiar with those places along about 1917 or 1918. I worked for Mr. Dunn in 1921. Quite a while back, in the early days, I knew those people in there. (R. 1399.) I visited with those people up there in the early nineties, along the middle nineties, something like that. These people were living there at that time; had their homes, their household goods, furniture, and farming implements there. They raised stock there and put up hay. (R. 1400.)

Mrs. Fay Comegys, called as a witness for the plaintiff, testified in substance as follows:

When we lived at the Narrows we visited all the neighbors who lived east of us.

Mr. Blackmar. Q. Jason Bennett, and Mrs. Griffin, and those people up there?

A. Yes, sir.

We have ridden there in a boat when the water was real high, but when the water was not real high, we would go on horseback. That is before we had cars. Sometimes we went with a team.

Mr. Blackmar. Q. Did you go right up through the (Malheur) lake, or swamp, or did you go out around through some road and come in from the north?

A. Yes, we always went around the lake and came in.

Q. From the north?

A. Yes, sir.

Q. And down in that country in those days, was there a pretty well defined road coming in there?

A. Not very good.

Q. Well, I understand not a very good road, but could you see the marks of other horses and of other wagons going in there? (R. 1413.)

A. Yes.

Q. And when you went down to see these people you just followed these wagon tracks?

A. Just followed the tracks.

Q. Do you call to mind any time when you were visiting your neighbors up there around the Bennetts when you got stuck in the mud, or were you always able to get in and out when you started?

A. No; we were always able to get in and out. When we were afraid we would get stuck we didn't go.

Q. Going up to Scott Haley's house, were there times, say, when you were a young girl, when you were able to go direct from your place to Mr. Haley's without going out and around?

A. He lived several different places. Where he lives now?

Q. No; I mean where he lived down there near the Bennetts.
A. Oh; down there?
Q. Yes.
A. No; we always had to go around. (R. 1414.)

Cross-examination:

We nearly always went around when we visited Mr. Haley's place down there in the (Malheur) lake because it was a better road. (R. 1414–1415.)

Mr. LILJEQVIST. Q. Could you get in there at all with a wagon in the spring of the year?

A. No.

Q. Were there times when you could get neither into Jason Bennett's, Scott Haley's, nor those neighbors in the springtime?

A. In the spring of the year they usually moved out.

They came back later on in the year and cut hay. When they moved out of there, they had a place on the outside. Jason Bennett did not, but Scott Haley did, and he moved outside and then moved back in the wintertime. He moved in and out according to the season. (R. 1415.)

Mr. FAY COMEGYS, called as a witness for the plaintiff, testified in substance as follows:

I first came to Harney Valley in 1886 with my father and mother, and lived for eight or nine years a couple of miles south of Rocky Ford on the Blitzen River. (R. 1421.)

Then eventually I moved down to Malheur Lake. I did not buy any property there; I had a place there a little while and I rented places around there, and worked around there.

I was down there lots of times when I was a young fellow.

In 1891 and 1892, I worked at the Sodhouse for Pete French, riding for cattle.

In 1893 or 1894, my sister, who was then single, took a place there on unsurveyed land in Malheur Lake and lived on it. It joined the Alva Springer place on the north; (R. 1422) that property was known as the Comegys place. Since then, it has become known as the Hill Brothers place. It joins where the Hill Brothers live now on the east.

(NOTE.—The Hill Brothers house now is in the north half of the northeast quarter of section 34, T. 26 S., R. 31 E.—Pecore. R. 1423.)

The WITNESS. I know where the Hill Brothers house is situated at the present time, but the house that we lived in was east of that, about a quarter of a mile.

The Hill Brothers house is what was known as the Hughet place; Judge Hughet used to have it. I helped my folks there cut hay, raise stock, and farm on the place.

I know where the Neal line is with reference to the house which we lived on the Hill Brothers place. (R. 1423.) It is on the

north line. The Hughet place (where the Hill Brothers now live) was half a mile square, and it was right on the north line. It is three-quarters of a mile between there and the old meander line (of 1877) and the new (or Neal) meander line; quarter of a mile from Alva Springer's place, and quarter of a mile over (to) the Hughet place.

During the time that my family lived down there, I did not cut any hay below the Neal meander line. Judge Hughet did, though. He cut hay probably half a mile out (north) from the Neal meander line along in 1893, 1894, or 1895. (R. 1424.)

I do not know whether there were any houses below the Neal meander line when I went in there on the south side of Malheur Lake to live, in 1893, 1894, or 1895. I do not know exactly the course of the Neal meander line after it reached the Dunn place. There may have been a cabin or two (in there). I have been along there lots, but I do not know exactly where that line ran after it got over to the Dunn place. The Bennett place is on the north side.

I know a man down there by the name of Coon Smyth, and he had a cabin there at that place. His place was west, probably four miles, and north about half a mile, of the house in which I lived.

Mr. Coon Smyth is not the same man who is known as Hog Smyth. (R. 1425.) Mr. Hog Smyth's place was over on the north side here in the Island country. I have been around there, but I do not know exactly where his place was located, and I do not know whether he had a house there.

I knew a man by the name of Tex Martin, and he had a place east of the Alexander McKenzie place inside the (Neal) meander line over towards the Narrows; it was unsurveyed land, and has not been surveyed to this day. I have visited over at his place when he was haying. He had a house there. (R. 1426.) He and his family lived there when he was cutting hay. He had the usual farming implements and household goods there.

I know another man by the name of Star Buckland. He came in later. I do not remember him having a place in there in the early days. He has been there in the late years.

I knew a man by the name of Taf Miller; I do not know where his place was; he was claiming some place in there (Malheur Lake) by the Tex Martin place; it may have been it; I do not know; it was later years. I never visited him at his house, and I have never been in there since he claimed his place, and I do not know whether he has a house there.

I know George Greely. He claimed some land in there (Malheur Lake) in later years, but I do not know—it has been twenty years ago; he had a claim to some (R. 1427) land in there (Malheur Lake), and he wintered some stock in there.

I know Tim Crowley; he had a house in there (Malheur Lake) some place, but I could not say where; he lived up in the Lawen country mostly.

Mr. BLACKMAR. Q. At any rate, when you first came into the country down there, there were a large number of settlers who had houses within the Neal meander line?

A. Yes.

Q. Quite a number. And those people cut hay in there, didn't they?

A. Yes.

Q. And stacked it inside the (Neal) meander line?

A. Yes.

Q. And fed it to their cattle inside the (Neal) meander line?

A. Yes, sir.

Q. And continued to live in there all the time that you have been familiar with that place?

A. Well, they came in there in July and put their hay up, and they would feed their stock, and in the spring, they would move out.

They would take their stock out in the spring of the year, most every year in the early days; it was pretty wet from 1895 to 1900; the water was pretty high. (R. 1428.)

When the water would recede, they would return to their homes. (R. 1428–1429.)

Cross-examination:

East of Pelican Island, toward Windy Point, it was a lake. (R. 1433.)

Mr. LILJEQVIST. Q. You mentioned a number of men's names. One was Tim Crowley. What kind of a cabin did he have on there (Malheur Lake)?

A. I don't remember now where his place was at. I know he lived up about Lawen. His people there did.

He cut hay in the summer time some place on the north side; I do not know whether he was inside the (Neal) meander line or not.

Mr. LILJEQVIST. Q. George Greeley, where did he live?

A. Most of them claimed a place out by the Tex Martin place years ago some of the time.

I do not know whether he moved out every year or not. He was in there two or three years and hayed a little (R. 1434) in August or September (of each year); he put up the hay there, and fed it in the wintertime. He moved the stock out in the springtime, on account of too much water.

Mr. LILJEQVIST. Q. The same thing with Taf Miller?

A. Yes.

Q. Same thing with Star Buckland?

A. I don't know if Star Buckland had a place. He came in later years. I wasn't there then.

Q. Mr. Blackmar asked you if those people went down to the (Malheur) lake to their homes. Was the lake their homes, or a place where they went down and cut hay?

A. Some went in and cut hay and moved out. That is in the spring.

Coon Smyth, whose name is Sylvester Smyth, is not alive now; I believe he died since 1920.

He did not get that name "Coon" because he did a great deal of trapping down in that country; he did it in southern Oregon, so I have been told. (R. 1435.) He never did any trapping in this country that I know of. He had a place at Happy Valley which was his home. He (Coon Smyth) put some hay up on the south side of Malheur Lake where he had a place. I knew where his house was located. It is around close to the Reinemann place.

I never did help Coon Smyth do any haying, nor did I ever help the Hill Brothers. (R. 1436.) I helped Judge Hughet hay.

Mr. LILJEQVIST. Q. Where did the (Malheur) lake come in the spring with reference to the north line of the Hughet place?

A. It varied. Some years it was high, and some years lower. Some years all over it.

I know where the Neal meander line was on the Hughet place.

Mr. LILJEQVIST. Q. In the ordinary springtime did the (Malheur) lake back to that line?

A. Yes.

Q. Did the lake back up enough to still stop the waters of the Blitzen (River)?

A. I don't know whether it stopped them or not. At high water it did not seem to run much. It just evaporated.

Q. I suppose when the lake merged with the waters of the Blitzen, and they both stopped, and there was no movement, it would be pretty difficult for anybody to tell whether it was lake water or river water, wouldn't it?

A. Yes; it would.

The situation was as I have described it, the water stopped and evaporated as the season went on. (R. 1437.)

Mr. LILJEQVIST. Q. Was the Neal line established substantially where the back waters of the lake came to in the springtime?

A. When he run it there, there was no water there.

Q. He ran it late in the fall and in the winter, when it was dry weather?

A. Yes.

Q. I am asking, in the normal springtime, the line he ran in the place you knew it, was it substantially where the lake water backed up in the springtime?

Mr. BLACKMAR. Do you know what he means by the normal springtime?

A. No, sir; I don't.

Mr. LILJEQVIST. Q. Well, tell me any year, of all the time when you knew it, when that lake (Malheur) did not back up and flood the Neal line, that area around the Hughet place and the Hill place, and where you have described?

A. What year?

Q. Do you know any year the lake did not back up to that line?

A. Of late years they have no water, and it didn't back up.

Q. It is dead dry now?

A. Yes.

Q. There is no water anywhere?

A. No. (R. 1438.)

I was down there in 1894. I was at the Sodhouse in 1893 and 1894. I have been around there—I worked for Alva Springer here six years ago helping him hay.

I was down there to the old place where I got hay in the old days.

Six years ago when I went over and helped Alva Springer cut hay, there was no water on the place; there was water in the spring.

Mr. LILJEQVIST. Q. There was water in the spring six years ago to the old Neal line?

A. Yes.

Q. Back to the time you first went there, I was trying to pick out not the recent years, but six years back, where did the water come to ordinarily with reference to the Neal line?

A. Some years it came up to it, and some years it didn't, I guess.

I could not tell you what years the water did come up to the Neal line, and I can not tell you any year it did not come up to it there; I kept no track of it.

In the early days, when I was there working, I was quite familiar with it (the Neal meander line). (R. 1439.)

Mr. LILJEQVIST. Q. And the water of the lake, it backed up to the Neal line in those days, didn't it?

A. Yes.

Q. These other people that cut hay down in the lake, some of the names you have mentioned, in the springtime, when they moved out you could go all around the place they cut hay later in the fall in boats, couldn't you?

A. Some years you could, and some years you could not.

I do not know how high the water would have to be when you could not go around them.

Mr. LILJEQVIST. Q. And when the water backed up to the Neal line, could you go around them?

A. Well, you could some of them, I guess.

Q. And when the water backed up to the old Meldrum line, you could go all over it with a boat?

A. Yes.

Q. Where they cut hay later on, couldn't you?

A. Yes.

Q. As a matter of fact, in the years you knew it, isn't it a fact that the only reason you could cut hay is that the water would rise in the spring and it flooded and overflowed that land for various depths?

A. Yes.

Q. In other words, if it had not flooded the land, and the lake did not get high enough to flood, they couldn't get hay?

A. They would get some hay. (R. 1440.)

Q. Not to amount to anything?

A. No.

Q. Do you agree with the witnesses that the nature of the vegetation is such it requires flood waters, water going over and standing on it, to create a hay crop?

A. Yes.

Redirect examination:

Mr. BLACKMAR. Q. As I understand it, this water we have been talking about in that particular locality, part of that comes from the Blitzen River?

A. Yes.

Q. Well, now, in that particular locality, are you able to tell whether or not the flood water is from the Blitzen River, or whether or not it is from the (Malheur) lake?

A. Well, it comes from the Blitzen (River) and fills up in the lake, and when it gets so high it backs up, some years.

Q. In a good many years you have the water from the Blitzen River and no water from the lake, don't you?

A. Yes, sir.

I am not familiar with the conditions around there this year, and I have not been down to Springer's place since I have been here (recently).

Mr. BLACKMAR. Q. You did not mean to say, in answer to Mr. Liljeqvist's questions, that this water backs up to the Neal meander line, and stops there? (R. 1441.)

A. Why, it runs—it never runs down to the (Malheur) lake; it spreads out; some years the lake is high, and it backs her up; I have seen water clear on the old meander line, the Meldrum line, on the Springer and Dunn places.

Q. There is not anything about the Neal meander line that stops the water there, is there?

A. No.

Q. Some years it comes up to that line, and some years it goes above?

A. Yes; and below.

Q. Can you walk out there on that place of yours, or where you were, and around in that vicinity, and by the change of the vegetation, identify where the Neal meander line is?

A. I could not do it on account of the fence.

Q. Assume that there is no fence there: Could you walk out there and locate this line by any change of the vegetation?

A. No.

Recross-examination:

Mr. LILJEQVIST. Q. There is no salt grass line there, because the flood waters of the Blitzen (River) flooded the surveyed lands above the Neal line; is that correct?

A. There is no salt grass in there where I lived then.

Q. And the reason it is not there is because every spring the Blitzen (River) overflows the land? (R. 1442.)

A. Yes; the salt grass is around toward Windy Point and lake shore, on the (Malheur) lake.

Q. Places where the (Malheur) lake did not back up over it, or went over it just a little bit and receded, that is where the salt grass sprang up around that lake.

A. Yes.

Q. Wasn't that salt grass in the early days a pretty good indication of where the line of the lake was?

A. Yes.

Q. And, of course, the rule of the salt grass did not prove true in the overflow country of the Silvies (River), and did not prove true in the overflow country of the Blitzen (River)?

A. No.

Q. Because of the fact those rivers did overflow and the salt grass could not grow around the edges of the lake in those places?

A. It could not grow where the water went over it, because it would scald it out. (R. 1443.)

Mr. SIDNEY COMZGYS, called as a witness for the plaintiff, testified in substance as follows:

We had water on the Hill Brothers place when I lived there, and it came from the Blitzen River and spread out over it. It was backed up pretty well when we were there in 1894; very little hay was cut except on the knolls. We had too much water.

On this Hill place we always got our water first from the Blitzen River, before the (Malheur) lake filled up. (R. 1445.) We got quite a little lot of back water (from the lake) at that time when we went in there in 1894.

The overflow from the Blitzen River is merged in with the waters of Malheur Lake, and you could not tell river water from lake water. It was filled up and backed up there; we were pretty close to the Blitzen River there where it empties into the Malheur Lake.

When we moved over on the Dunn place, we got our water from the Blitzen River. I believe I was down there on the Dunn place for five years, and during that period, we got water every year from the Blitzen River.

Mr. BLACKMAR. Q. And how many of those years did you get any back up from the lake?

A. Well, at the time I owned that place, I really do not believe I got very little back water. (R. 1446.)

I do not really believe I got very much backwater from the (Malheur) lake. (R. 1446–1447.)

The only crop we raised on the Dunn place was wild hay, and during the five years that I was there, we were able to cut a crop every year; it was mostly sugar grass; it grew very rank; I cut as high as 300 tons of hay off a quarter section; it grew high, but was awfully rank. There was no salt grass there; there was a little different

kind of grass that grew there, but I do not know the name of it; it was kind of a wild grass; it got to be a good quality of hay every year, from year to year as you cut it. (R. 1447.)

I do not remember how far the salt grass extended from that little bank out there from Windy Point, down toward Pelican Island. The water some years was out closer to the bank, then it would recede away. I could not say exactly how far it was. I know that it got pretty low at different times out toward Pelican Island. (R. 1449.)

Cross-examination:

The water was above the Neal meander line in 1894.

I know in the late nineties we had lots of water there (in Malheur Lake) and especially in 1897. I remember that distinctly. (R. 1457.)

After 1897, the water (in Malheur Lake) kept getting a little less all the time; they kept cutting more hay; the water kept receding back a little farther after that year. I am not familiar with any other area on that (Neal) meander line.

As the hay was cut, it did not have an effect on the backwater of the (Malheur) lake; they cut more hay as the water receded back.

The water came up early in the spring and made the crops. (R. 1459.)

I could not say as to whether I have seen the water up to the top of the bank there at Windy Point. I do not believe I ever saw it over that bank. (R. 1461.)

That country in the western part of Malheur Lake always looked to me like a swamp country, and it was little knolls and little islands all through it. (R. 1462.)

Mr. Ora Winfield Hill, called as a witness for the plaintiff, testified in substance as follows:

I went down to live around Malheur Lake with my brother when he took a place there on the lake about 1893 or 1894. (R. 1537–1538.) The place now belongs to the Herman Ruh estate. It was west of what was known then as the Showen place, and north of the George Thompson place. I think the Neal meander line cut the place in two, but the majority of it was below that line.

(Note.—The Showen house is marked here (on the map, Plaintiff's Exhibit No. 3) in lot 1, section 31, T. 25 S., R. 32½ E., and the east boundary of the southern end of the Ruh property above the meander line is just a few hundred feet west of the Showen house. The Ruh property extends away back up here at the present time through section 30, T. 25 S., R. 32½ E., and then over into section 25, T. 25 S., R. 32 E., north of the lake.

The Ruh house is near the line of sections 24 and 25, T. 25 S., R. 32 E.—Pecore, R. 1538.)

The Witness. My family is not interested in that property now.

My mother, two sisters, and myself lived there on that place all one summer, about 1895 or 1896. I could not tell you the last

date that I was there. We owned that property for four or five years, and then sold it to Ruh. My judgment would be that the water we got on that place backed up from the (Malheur) lake.

The Silvies River cut one corner of the ranch in two; it cut off a few acres of the ranch near the Showen house. (R. 1539.)

Mr. BLACKMAR. Q. During the time that you lived there, did the water coming from the run-off in the mountains, did the water rise to (R. 1539) the same place every year?

A. No, sir; it would vary, I think, from year to year. Some years it was a little higher, and some years maybe it was not so high, but that was the experience I found down there.

During the summer and fall months the (Malheur) lake receded from our place, and the distance it receded I think would change from year to year, according to the amount of water that came into the (Malheur) lake.

The kind of crops we had on our place was confined to hay, of different kinds, but we cut sugar grass, which was the best kind, and we picked that out. There was a salt grass knoll on the ranch where the house set, and there was salt grass there. I think there was four or five acres on this knoll that belonged to the ranch, which was particularly salt grass. (R. 1540.) We used the salt grass part of the ranch mostly for pasture.

Mr. BLACKMAR. Q. As you came down from your place to the north, walking down toward the (Malheur) lake, was there any bank or step-off there, or was there just a gradual slope?

A. A gradual slope.

Q. Very gradual?

A. Yes.

Q. It was practically flat, wasn't it?

A. Yes. From our place south it was practically flat, or it seemed so.

While I was living there (on the Showen place) there were other settlers who lived south of us and west of us, who had houses there. (R. 1541–1542.) I visited some of those people (during the time I lived there).

A man by the name of George Thompson lived south of us, and I visited him. I walked over to his place and I have been over there on horseback; I do not think I have been there in a wagon. There was a road leading to the Thompson place, and I had no difficulty in finding my way over there.

A fellow by the name of Vestel Hanks joined our place on the west; he had a little cabin down there. Both he and George Thompson were old bachelors. (R. 1542.)

Mr. Showen lived east of us.

I do not recall anyone else just now that lived south.

I remember Pinto Tom, and I heard he had a cabin there, but I could not tell you where it was.

I have been around the Thompson place hunting.

On the high ground on the Thompson place I have seen some sugar grass, wire grass, and fox tail growing around his house. There was a ridge there.

Mr. BLACKMAR. Q. Are there other islands in there that you have been on, or raised places right near Thompson's place that you recall?

A. The Thompson place is all that I remember; the one place where his house sets. It was more of a long ridge. (R. 1543.)

I do not remember that there was any salt grass on the Thompson place.

Cross-examination:

Where I lived I suppose you would call it on the (Neal) meander line; I would imagine south of the place there was more tule and swamp land than north of it. It is true that south of our place were tules, and north of it was more hay.

Mr. LILJEQVIST. Q. Now, right in front of the Showen place there was a deep channel, as it had been called. Isn't it the fact that it extends from the Showen place westerly?

A. I don't know. There is low ground, but I wouldn't know whether they would call it a channel, or not.

It seemed as though the place in front of the Showen place was covered with water most of the time.

I have seen the Thompson place completely surrounded by water in the springtime.

In the springtime the water came onto our patented lands. I never saw the Thompson house on the ridge covered with water. It was a little higher right where the house was. (R. 1545.) That house was a board shack; don't remember the dimensions of it, but it seems there were two rooms to it; it was just a small house. Mr. Thompson moved out of it part of the year, and he would come there in the fall and cut hay around there. I do not think he had any stock; he might have had a very few. I don't believe he lived there in the springtime. That is also true as to Mr. Vestel Hanks that lived west of our place. He (Hanks) moved in and out of there with the seasons, too.

Mr. LILJEQVIST. Q. As a matter of fact, you knew when people came in and when they were starved out or drowned out, and there was a continual procession of fellows coming in and squatting on these ridges that projected above the water, and they would go out and somebody else would come in, wasn't that about the way that country was?

A. I don't know as to that; I couldn't hardly answer as to that. (R. 1546.)

My uncle cut holes in the ice in the winter so the cattle could go up and get water; he used to run cattle down there.

People used to skate on the ice there in the wintertime. (R. 1547.)

Mr. A. A. REINEMANN, called as a witness for the plaintiff, testified in substance as follows:

In connection with my father's homestead, known as the Reinemann place, we also had some land north of it, towards the (Malheur) lake, but we do not have it at the present time. We cut hay in there, some squatters have been in there, but we did not want to fight with them about it, and we just let them take it. We have cut hay on there ever since we have had the place.

Mr. BLACKMAR. Q. When was it that the squatters moved in?

A. I don't remember just when they did. It has not been so awfully long. (R. 1664.)

We cut hay on about 80 acres. The rest of it was tules, and not fit to cut. That 80 acres that I am referring to was beyond the Neal meander line. (R. 1665.)

During the time that I have lived on that (Reinemann) place, as the years passed by we got some water on it, from the Blitzen River.

Mr. BLACKMAR. Q. Did you get any back-up water from Malheur Lake?

A. Well, not that I know of. There was always a strong current coming through between the house and the barn, a good current of water, and it came through Myrtle Caldwell's place, too.

Q. And you got your crop from the water that was from the Blitzen River?

A. Yes, that is what we depended on. (R. 1666.)

Q. Can you ever remember a year that hay has not been cut to the north of your place there and stacked within the (Neal) meander line? (R. 1669.)

A. I don't think that there has ever been a year that you could not stack something in there.

Q. And then it was fed on the place?

A. Yes.

There are several dams in there on the Blitzen River a short distance above our place (the Reinemann place).

Mr. BLACKMAR. Q. Did you have a dam on your place?

A. Just a small—just dammed up the slough to kind of hold the water—sod dams.

Q. This Neal meander line was the subject of a good deal of discussion with the various farmers down there?

A. Yes, sir; I guess it was. (R. 1670.)

When we lived down there (on the Reinemann place) most of our household purchases were made at the Narrows, and not at Burns, but from time to time we would go to Burns; I have made that trip quite a few times myself.

The route we would follow in going to Burns would depend upon the time of the year; if it was in the fall we would generally go through north of the (Reinemann) place, because it was much shorter. We would come out on the north side of the (Malheur) lake

sometimes at Lawen; it depended upon where the water was; sometimes we came out at what they called the Swan Lake Field.

We used to follow that route usually in the fall of the year; sometimes we went by horseback; at other times in a wagon, and sometimes by buggy.

Most of the people who lived around in our neighborhood went through that way. (R. 1671.) That was a pretty well defined trail up through there. (R. 1671–1672.)

Mr. BLACKMAR. Q. A stranger would not have any trouble following it, would he?

A. They never seemed to have.

Q. Some of the seasons of the year when you have been there have you been able to follow that trail in the spring and summer, too?

A. You could go through if you knew it. If you knew the country. A stranger could not get through.

I have gone through there on horseback.

I used to drive a four-horse team down there sometimes; we used it for different purposes; sometimes took it down in the field to hunt ducks; four horses would take a wagon through those sloughs pretty easy. You would not get mired down too bad.

On the trips when we used the wagon we did not run into very deep water; the deepest I ever saw the water was mostly up to the running gears of the wagon.

Mr. BLACKMAR. Q. And on those trips you were going to what particular part (R. 1672) of the (Malheur) lake?

A. We were going north from the house. We would just go down in the lower fields there north from the house and a little bit east.

The greatest distance we would go down from the house would be easily a good half mile.

Mr. BLACKMAR. Q. This place known as the Swan Lake Field has been referred to by some of the witnesses. What is meant by that?

A. It used to be a lake in there, I suppose, before it went dry; there used to be a lot of swans in there.

(NOTE.—Swan Lake is marked on the map, Plaintiff's Exhibit 3, and the fences bounding Swan Lake Field are on there and can be identified.

What is known as Swan Lake is between lots 10 and 12 of section 4, T. 26 S., R. 32 E., north of the lake.

The Swan Lake Field fence at the Neal meander line commences at about the northeast corner of lot 10, section 3, T. 26 S., R. 32 E., and then goes in a southwesterly direction about a half mile, and then almost due south pretty nearly a mile; thence west about three-eighths of a mile; thence northwest about half a mile; thence (R. 1673) southwest about three-fourths of a mile; thence west probably three-fourths of a mile; thence northwest less than a half mile, and thence north along the line between sections 17 and 18, of T. 26 S., R. 32 E. That is the portion of the area within the Neal meander line of what is known as Swan Lake Field.—Pecore. R. 1674.)

Cross-examination:

Mr. LILJEQVIST. Q. Did the backwater of the (Malheur) lake and the overflow of the Silvies (Blitzen River) merge there on your land?

A. Not that I could ever see it did. There was always a current going through the Silvies (Blitzen River).

The back water of the lake did not still the water there.

My father has been dead about four or five years, I believe. I recognize his signature.

Mr. LILJEQVIST. Q. Now, if he testified that, "Since I have become acquainted with Malheur Lake it has not receded in my judgment. At ordinary high water the lake fills up on the south side at Neal's meander line; in unusually high seasons it fills up beyond Neal's meander line." You don't agree with that statement?

A. No; I never did agree that was the (Malheur) lake north of us.

I always figured the (Malheur) lake proper was east, the main body. You could always get through on the north at certain seasons of the year, and if it was a lake you could not do it.

In the fall you could get through; in the dry seasons you could get through; naturally you would go through a little water doing that.

Mr. LILJEQVIST. Q. Your theory is if the lake backed up through the flags and tules it wasn't a lake?

A. No; I would just call it flood water.

I did not discuss it with my father very much. He had his own ideas. (R. 1678.)

Mr. JOHN J. HEINZ, called as a witness for the plaintiff, testified in substance as follows:

I have lived around Malheur Lake since 1891.

My place is located right north of the Showen place, and east of the Herman Ruh homestead.

(NOTE.—The house is shown on this map, Plaintiff's Exhibit 3, as being in lot 6, section 30, T. 25 S., R. 32½ E., north of the lake.—Pecore. R. 1679.)

I know where the Neal meander line is.

During the time that I have lived on that place, I have cut hay both above and below the Neal meander line (every year), except one year. The reason that I did not cut it that year was because we had a high water that year; I am not sure whether it was 1897 or 1898, and we could not cut any. I had a family, and I could not live in there with the family. They had to get out to school. I lived outside that year.

In other years I did not live on my place all the year round. We had a little stock, and we lived out in the foothills in the summer, and came back and cut the hay and put it up and lived there in the winter. We would move out in the spring on account of the water. (R. 1680.)

Cross-examination:

Immediately east of my house the land practically slopes.

Mr. LILJEQVIST. The map (Plaintiff's Exhibit 3) shows between probably a foot and a foot and a half; is that correct, in your judgment?

A. Somewheres near it; yes, sir.

Q. From the map there is evidently a body of lake back in around to your east, of open water; is that correct?

A. Well, the water generally comes from the (Silvies) River and gets in there.

Q. It fills up the place there, does it?

A. Yes.

The lake may back up and meet the water there.

We generally have to move out when the break-up comes; before the big rush comes.

My house is on a little ridge on the outside of the meander line, on surveyed land; it wasn't at that time. I was inside the old meander (line of 1877). (R. 1684.)

When the water was there in the spring, the place where I built my house was cut off from the outside.

The Silvies River overflowed on the north, and also on the west; we could not stay in there until it was too late to get out. The Ruh field is in the west, and there is a low place there. I had to get out through that way to get out. We had no road in those days in there. I went toward the Ruh place.

I never had time to hunt. (R. 1685.)

Mr. JAMES A. TURNER, called as a witness for the plaintiff, testified in substance as follows:

I went down and built a house on the place I have just described (a quarter of a mile south of the Ben Ausmus house). I went in there and took up this place as a squatter's right. The land was not surveyed. (R. 1721–1722.) When I was living down there I did not have any family then; I was a bachelor. I had as much household goods down on that place as any other bachelor would have. I had a stove, bed, and what clothes I had, were there. I did not have farming tools, nothing only a wagon and horses, and such things.

I did not put any hay up while I was living down there. (R. 1721.)

At the time Mr. Neal was in there surveying (in 1895), I got to my place by coming down by Lawen and driving in there; came down the road and just drove on in there.

At the time Mr. Neal came through there my place was above water. (R. 1723.) There was a considerable area of ground between my place and Mr. Neal's line which was above water. (R. 1723–1724.) I would say that the water was a half a mile south of my house when Mr. Neal came through there (in 1895).

Some of the other settlers in there used the same road to come in that I did. The road was pretty well marked on the ground by tracks at that time.

Mr. BLACKMAR. Q. A stranger would not have any trouble following it, would he?

A. No.

During the time that I was in possession of my house down there (in Malheur Lake) the lake never did come up over the floor of my house; it never came up by the house, but I have seen it out next to the lake, the Sand Reef was higher than it was up by the house; it was kind of a swig between this reef, like north, I have seen the water come in and water between where I had my house and that Sand Reef next to the lake, come over it, rise over it. (R. 1724.)

Cross-examination:

I do not know who owned the land immediately above the (Neal) meander line after it became surveyed.

Mr. LILJEQVIST. Q. Where is Ausmus' place?

(Mr. Pecore indicates on map.)

Mr. LILJEQVIST. Q. Is that where the Ausmus house now is?

A. No; the Ausmus house is farther north from where I had mine.

Mr. Ausmus has his house about a quarter of a mile north from where I had my house. (R. 1729.)

I did not go out there in the springtime because I never had occasion to go out there in the spring.

Mr. LILJEQVIST. Q. There was too much water there between there and the Neal (meander) line, wasn't there?

A. No.

I would go in there and winter my cattle there, and in the spring when the spring would break up and the grass would get so that I could take them to the hills, I took them to the hills.

I have never seen the water clear around Saddle Butte; I have seen it pretty well out to Saddle Butte, along in the nineties. (R. 1730.) From 1895 to 1900 the water did not get around Saddle Butte; I have never seen it clear around the Butte. During those five years I have seen it up close to the Butte, but I could not say how many years out of the five.

The water in the springtime came to the Neal (meander) line, and above it, too, but I don't know how far. I have seen it past the line. I will say it came probably a half a mile. In the fall when it dries up it would go below it. (R. 1731:)

There is a slough on the east side of the Ausmus place that went out toward Otley's; I never knew the name of it; it never had any name when I was there that I know of. (R. 1731.) The water of the (Malheur) lake backed into that slough.

I know Mr. Otley, but I don't know whether he was president of the Malheur Lake Riparian Owners' Association.

Mr. LILJEQVIST. Q. He (Otley) claimed to own out to the center of the (Malheur) lake because he was on the (Neal) meander line where the water came, is that correct?

A. Yes.

Q. That was his contention for years, wasn't it, until he died?

A. It wasn't that way every year; no.

Q. Didn't the water substantially every year come along the (Neal) meander line on the north?

A. No; not every year.

Q. What year didn't it come?

A. The (Malheur) lake varied. The lake would vary, and the depth of it—it would depend on how much snow we would get in the mountains, and how quick the snow would go off, and the run-off would make the water. If we had a warm spell and the water went out quickly, it would come down and raise the lake, and in (R. 1732) some years it would not do that.

Q. In the time you lived there, those five years you were there, you were there two years but familiar with it about five years?

A. No, I was there two years.

Q. Did you know any year it did not go to the (Neal) meander line that you were there?

A. Not in those two years; no.

Q. What did you do after those two years?

A. Well, I left there; I moved out of there and I didn't go back. When the meander line was surveyed I didn't think I would ever get the land, and so I left.

Q. And so you are only talking—the testimony you have given is only about the two years you were there?

A. No; I was around that lake there for years. I had land rented up there, and I had hay, and I was for years around that lake.

Q. Around the north side of the lake?

A. Yes. (R. 1735.)

I was on old man Jordan's place; I had it rented there for three or four years. That place was situated north of the (Neal) meander line. I lived on the Spurlock place one year; that was deeded land, north of the (Neal) meander line. I could not say just where the water came to with reference to the (Neal) meander line immediately south of the Spurlock place.

I have been out in Malheur Lake on a boat, but not to the place that I lived on for a year and a half. I went out there in the fall, and drove in with a wagon and team. (R. 1734.)

Mr. ALVIN C. SPURLOCK, called as a witness for the plaintiff, testified in substance as follows:

Neither my brother nor I have ever cut hay down there. There might be just barely a little corner below the (Neal) meander line where the (Malheur) lake made a bend around that we dropped over just below it; not to amount to anything.

There was no difference between the vegetation above or below the (Neal) meander line.

Mr. BLACKMAR. Q. So that a person walking along there, cutting hay in there, could not tell where the line was, could he?

A. No, sir; there is a kind of a back water that runs up there, in there, that the meander line runs right along, and on each end of it; it is just the same. It runs across the low place.

It is a kind of a slough, but the (Malheur) lake has no bank there.

The water we got on our place is from both the east and west forks of the Silvies River, but in some unusually high years it (the water) backs up from the (Malheur) lake and meets there on our place. (R. 1775.)

Mr. BLACKMAR. Q. During the period of time that you have lived there and have seen this back-up water from the lake, I will ask you whether or not it comes to the same point every year?

A. No; it varies. Sometimes there is more water than other years.

In any normal year the water from the (Malheur) lake will come up as far as the Neal meander line. Of course, the last few years it has been awfully dry.

Mr. BLACKMAR. Q. Now, in these years you speak of, sometimes does it go above the Neal meander line?

A. Oh, yes, yes; it goes up—well, it is over a quarter of a mile above, pretty near high.

Q. Are you talking about water in the slough, or all over the place?

A. It just backs up in the slough, in the tules.

Q. So that even when it backs up in this slough, still there will be some land which is not covered with water?

A. Oh, yes; lots of land that ain't covered with water.

Q. You do not mean to say that your entire place was covered with water for a half mile up?

A. No. (R. 1756.)

Quite a number of years it (the water of the lake) has not backed up to the sloughs.

Mr. BLACKMAR. Q. The fact of the matter is, it is not very certain about where the water will come in any one year?

A. No; it will vary.

I remember the occasion (in the middle of November) (R. 1759) in 1895 when I bought 25 cows and 10 head of calves from George Marshall. I took charge of them over there where he (George Marshall) lived at the Sodhouse Springs; they called it that then. Springer's Spring I believe they call it now. (R. 1757.) We brought them across to around—to the left of the (west end of Malheur) lake, and came out there at the Adam George bridge, and took them up to where we were living at that time in sections 8 and 9, T. 25 S, R. 32½ E.

Mr. BLACKMAR. Q. In taking those cattle from down there on the south side, was there a pretty well defined road up through there?

A. Well, there was good trails where they had been going through there with stock.

I do not remember whether there were any marks of any wagons or buggies through there at that time; they could have gone through there all right if they had wanted to.

I remember a man in there (Malheur Lake) that they called Pinto Tom, and I think that trail passed within about 200 yards of his place. (R. 1758.)

Cross-examination:

The time I went through (the western part of Malheur Lake) with those cattle (I purchased from) Mr. George Marshall in 1895, it was about the middle of November.

You could not go through there in the spring. (R. 1759.)

We used to have big snows in the mountains and lots more storm, and the lake was filled up more.

My brother has a place (the Charles A. Spurlock homestead) on the (Neal) meander line.

Mr. LILJEQVIST. Q. And the water ordinarily came up onto his land in the spring, did it?

A. Yes, in the sloughs.

The water backed up in the sloughs; it run through his place. It was from the (Malheur) lake, and then the sloughs come out of the Silvies River. It floods from the Silvies River in the spring; the west prong of the Silvies River runs through his place, and in high water it backs up from the (Malheur) lake, when it is an average year.

Mr. LILJEQVIST. Q. Did it do that in 1895 when Neal was in there and surveyed, and '96, the spring I mean?

A. Yes, I have an idea it did. (R. 1760.)

It is not impossible for salt grass to keep its hold on account of flood water of the Silvies River. It always grows on the high ridges. Sometimes the water will get right up pretty close to the top. Ordinarily the salt grass grows right above the water's edge.

Mr. LILJEQVIST. Q. Around the northeast, the east, and the southeast part of the lake, wasn't there in the early days a well defined stretch of salt grass between the water's edge and the greasewood?

A. Out towards Windy Point there was.

I think that salt grass grew just above the high-water mark of the (Malheur) lake, as a rule. Below that you get marsh grasses as a rule, and tules out in there, towards Windy Point. (R. 1761.)

Mr. CHARLES A. SPURLOCK, called as a witness for the plaintiff, testified in substance as follows:

The water that I got on the land that I homesteaded (in lots 8 and 9, T. 25 S., R. 32½ E.) (R. 1754, 1764) came from the east and west forks of the Silvies River and the backwater from the (Malheur) lake.

There are some sloughs through my place which carry the water down to the (Malheur) lake, and then the lake backs up in the sloughs.

Mr. BLACKMAR. Q. Do I understand through these sloughs that part of the water from the Silvies River runs down to the lake?

A. Yes.

Q. And then when the (Malheur) lake fills up this water backs up through these sloughs?

A. Backs up through these sloughs. (R. 1764.)

The water runs over the country in sloughs, and meets there on that place. On the way down to the lake it waters my land.

The land immediately south of my homestead, and within the (Lake Malheur) Bird Reserve, where the (Neal) meander line is, is occupied by Mr. Heinz. (R. 1765.)

I think that when the salt grass is not covered with water all over it makes better hay. (R. 1765–1766.)

During the time that I have lived on my property I have never had the entire homestead covered with water. The ridges are always sticking out, and the high ground.

I think there is 159 acres in that homestead.

Of the 159 acres which I have, the greatest number of acres that I have ever seen covered by water in any one year must have been two-thirds, anyway. I could not tell how much of that water comes from the overflow of the Silvies (River), and how much from the backwater of Malheur Lake, when that two-thirds is covered.

The water of the Silvies River is pretty fresh when it first comes down out of the mountains and spreads out down there. Later on in the year I think it becomes slightly alkaline. (R. 1766.) I have never known any of the people living near the Silvies River to use that water for drinking purposes. We dug or bored wells down there. (R. 1767.)

Cross-examination:

The water covered two-thirds of my land, which is deeded land. I have seen two-thirds of my land covered with water in different years.

Sometimes the water gets up about a half a mile, I think, on the place.

Mr. LILJEQVIST. Q. You claim that (Neal) meander line on your land, do you?

A. Well, I haven't been claiming it.

Q. I don't mean below the meander line. I mean up to the meander line? (R. 1767.)

A. Yes; it is deeded up to the meander line.

I have not any land fenced in below the (Neal) meander line. Immediately below the meander line is the Heinz place, and he has it fenced, but I don't know how long he has had it fenced.

He (Heinz) was in there before I went in there. I think I was in there about 1892. I don't know whether he had it fenced then or not.

I bought my place in 1898, and George Sebring owned it before that. (R. 1768.)

Mr. THOMAS T. DUNN, called as a witness for the plaintiff, testified in substance as follows:

I remember there were higher waters in the 1890's, but I don't remember the particular year.

(NOTE.—Mr. (Thomas T.) Dunn's present house is right near the line between sections 6 and 31, of townships 26 and 27 south, range 32 east, south of the lake; and his mother formerly had a house at the spring in lot 5, section 31, of township 26 south, range 32 east.—Pecore. R. 1819.)

(The old Dunn house was on lot 11, section 31, T. 26 S., R. 32 E., as near as I am able to find out. The house in which Mr. T. T. Dunn now lives is shown by Plaintiff's Exhibit No. 3 in the southeast corner of lot 2, section 31, T. 26 S., R. 32 E.—Pecore. R. 837–838.)

(The present house is right near the line between sections 6 and 31, Tps. 26 and 27 S., R. 32 E., south of the lake. Pecore. R. 1819.)

(Mr. Thomas T. Dunn's mother (Martha Dunn) formerly had a house in lot 5, section 31, T. 26 S., R. 32 E. (R. 1819), and practically at the edge of the spring shown on Plaintiff's Exhibit No. 3 in lot 11, same section township and range.—Pecore.)

(The final certificate No. 1232 was issued by the Government on June 11, 1908, to Thomas T. Dunn for lots 4, 9, 10, 11, 12, and 13, section 33, and lot 4, section 28, T. 26 S., R. 32 E. This property is ordinarily known as the Ted Dunn homestead and it has a shack upon it which is indicated on Plaintiff's Exhibit 3, in the northeast corner of lot 12, section 33, T. 26 S., R. 32 E. Mr. Dunn's homestead lies east of what is known as Dunn Lake.—Pecore.)

(Mr. Thomas T. Dunn is the owner of, or now in possession of, the following lands on the south side of Malheur Lake: Lots 1, 2, 10, 11, 12, and 13, section 31; lots 1, 2, 3, and 4, section 32; lot 4, section 28; lots 4, 5, 9, 10, 11, 12, and 13, section 33; all in T. 26 S., R. 32 E., south of Malheur Lake. Lots 6, 7, 8, and the south half of the northwest quarter of section 4; lots 3, 4, 9, 10, and southeast quarter of the northeast quarter, and the southeast quarter of the northwest quarter of section 5; lot 3, section 6, all in township 27 S., R. 32 E., south of Malheur Lake.—Pecore.)

(Mr. Dunn also uses and claims the land bounded by the fence running north about seven inches on the map, Plaintiff's Exhibit No. 3, from the northwest corner of lot 4, section 32, T. 26 S., R. 32 E; thence roughly east about three and one-half inches on the map, plaintiff's Exhibit No. 3; thence in a general southerly direction about nine inches on the same map; thence east about one inch on the same map, and thence southwesterly about one-half inch on the same map to the southwest corner of lot 11, section 4, T. 27 S., R. 32 E., all of which is shown on Plaintiff's Exhibit No. 3.—Pecore.)

The WITNESS. We have a place cut clear around around there (inside the Bird Refuge) that we cut hay on, or farm, along this land, ever since we have been down there about; sometimes that

would be on the reserve; of course, as the water went down and there was grass, we would cut hay for cattle. (R. 1819.)

My house is on deeded land.

My father started to build the frame of a house on Dunn Island and it stood there for many years. When he put that little frame of the house there, it was in the nineties, some time, but I do not remember just when. I remember the house stood there, what was left of it, for many years.

Mr. BLACKMAR. Q. This island they call Dunn Island is kind of a continuation of Cole Island?

A. Yes.

I have been out on Dunn Island a good many times.

I have not seen the (Malheur) lake so high that it covered Dunn Island entirely. (R. 1820.)

Since our family or myself moved down there, near the (Malheur) lake, there have been years in which myself or family have not cut hay within the Bird Reserve. I do not remember what years, but the water was too high lots of years; we could not get in there; some years there was no hay there, it was dry. I do not know how many different years the water has been so high that we could not cut hay; there has been several of them, a good many of them, quite a few. By quite a few, I mean several years; I do not know just how many. I believe there has been maybe as many as five, maybe. It would be a little hard for me to say whether there were more than five years, I don't know; I could not say as to that; I don't think there has. (R. 1822.)

Mr. BLACKMAR. Q. Do you get your water from the Blitzen River, or do you get it from Malheur Lake? That is, water that makes your hay crop?

A. It comes from the lake. It is backed up by the lake.

Q. When the water comes up on your place in the springtime, for how many days does it stay there?

A. Well, there has not been any water there for a good many years in the lake; it has been dry.

There has been no water on my place for a good many years; not from the lake; we have not raised any hay there; have not had any for several years.

The water that we got from the lake there did not come to the same point every year; it varies some; some years it would be out quite a ways; some years it would not be so far; some years it stayed about the same.

Mr. BLACKMAR. Q. Do you know of any occasion when the water stayed on your property so long a time that it killed the salt grass? (R. 1825.)

A. Yes; in places.

Q. In some places?

A. Yes; in places; a few places.

Q. That is in the lower places?

A. Yes, sir; in the lower places.

I don't know how many acres of salt grass has been killed in any one year by the water. It was not a large number of acres, just small places as I remember it. The greater part of the salt grass continued to live on my place on the outside of the lake; along the outside of the lake, on the shore it was sodded over salt grass and the greater part of it was not killed by the overflow water on the outside.

Mr. BLACKMAR. Q. I don't believe I am very clear about that: Whenever you get water, the salt grass still comes back on your place, does it?

A. Yes; it is grass that the water seems like—it grows on the outside of the lake; as the water comes out clear around it seems like there is salt grass on the outside.

Q. Then on your place during the period of time you have lived there you have not had enough water on it to kill the salt (R. 1826) grass, have you?

A. Not on the outside; no.

Q. What do you mean, not on the outside?

A. On the outside of the lake where the water comes. (R. 1827.) I have waded out there among the tules in the (Malheur) lake.

Mr. BLACKMAR. Q. Have you been over around Red Campbell's place and Pinto Tom's, and those other homesteads over there in the west end of the (Malheur) lake?

A. Yes; I have been through there lots of times.

I generally got over there on horseback. I have rode in there after cattle in the fall some (R. 1828), and I have drove cattle through the swamp; on the west side I have driven cattle through there.

Mr. BLACKMAR. Q. These cattle you drove through the swamp, whereabouts did you enter the (Lake Malheur) Bird Reserve, or what is the present Bird Reserve? At what point?

A. I have drove cattle through and entered the swamp from the Culver Marshall place.

That is about where the boat house is on the reserve across the bridge there. I went through that way. It is a little northeast of the house in which Mr. Benson (the warden) lives. I have gone through that way, and I have gone through farther west. There is a road through there now that runs up there by the pump house over to the Doc. Graves place; I do not know when it was first established; I have ridden in that country but I do not remember that road only just in the last few years.

There is a little place down there in the southerly part of the (Malheur) lake near Cole Island, that is referred to as the Dunn Lake. (R. 1829.)

With reference to Cole and Pelican Islands, it lies over south of Cole Island, southwest a little, and it lies south of the Dunn Island. I have not seen water in that (Dunn) lake when there was no water at all west of Cole Island. At certain seasons of the year,

Dunn Lake is separated from the open water in Malheur Lake; that separation comes in dry years; in dry years there would be no water in Dunn Lake either.

Mr. BLACKMAR. Q. During all the time that you have been living there the settlers have cut the hay out there in the Bird Reserve?

A. Yes; there has been hay cut as far back as I can remember there.

There has been hay stacked there, and fed to the cattle in the (Lake Malheur) Bird Reserve. (R. 1830.)

Cross-examination:

Dunn Lake is on the bay that extends easterly of where my mother used to live.

Mr. LILJEQVIST. Q. Are you familiar with that map there? It is a contour map. It is Plaintiff's Exhibit 3. Here is a spring near where your mother had her house. When you are referring to Dunn Lake, is that that open area immediately to the right—to the east of it?

A. Yes, sir.

Q. And these little higher points above it, is that what you call Dunn Island?

A. Yes. (R. 1831.)

Q. And up until what time was it such approximate line of the high water? When did the water start to go down here, this present cycle we are suffering from?

A. When did it start to get dry, here, do you mean?

Q. Yes. (R. 1836.)

A. It seems to me like it has been close to twenty years since this started to change.

I do not remember whether the water came back in 1922 and 1923 up to the north line of my place. (R. 1836.)

Mr. LILJEQVIST. Q. Now, this road that you have described running by Doc. Graves' pump house, that road went over a big tule bed, didn't it, in later years. Didn't that road go over a vast tule area?

A. Yes, it goes through some tules, a lot of tules.

Q. Do you know whether or not you could have gone over that road in the springtime, three or four or five months in the spring when you first knew that country, over that place you went in subsequent years?

A. No, we would have to go around quite a bit. It was pretty muddy, and quite a bit of water there at times. (R. 1839.)

Redirect examination:

Mr. BLACKMAR. Q. Now, I asked you about a road that ran up there and came up around Doc Graves' place. Long before that was a road in there did you use to drive cattle up that way?

A. Yes, I worked cattle in there and rode a long time ago when there was cattle run in there at times.

There was a road, a cattle trail, that led across there; we drove cattle through there in the fall, and came out around Doc Graves'

place. There were some times when we went through that way, and at other times we went south or west and went out.

In the wet years, the water has not entirely covered up my place, not all of it. There is a strip of deeded land that would not be covered on the outside. That is high ground.

Mr. BLACKMAR. Q. What do the words "ordinary high-water mark" suggest to you?

A. That means when the lake is up high.

Q. When the lake is up high, in what year?

A. Well, along a while ago in those years; I don't remember the years. That is in the summer.

I have seen the water over that north line (Neal meander line) on my property.

Mr. BLACKMAR. Q. You did not mean to suggest that the water comes to a certain point every year, did you?

A. Oh, no.

Q. The fact of the matter is you hardly ever see two years alike, do you?

A. No, it varies; different; some years it was high and some years it was low.

Q. And some years it is very high and some years it is very low?

A. Oh, yes.

Q. You can not tell from one year to the next what it is going to do?

Mr. LILJEQVIST. That is leading.

A. No. (R. 1842.)

Recross-examination:

Mr. LILJEQVIST. Q. How far did the water go back from the spring-time to the fall?

A. Well, sometimes it would go back two or three hundred feet, or farther than that. The water would dry up in the summer, you know. (R. 1845.)

Mr. CLARENCE W. DRINKWATER, called as a witness for the plaintiff, testified in substance as follows:

During the six years from 1901 up to 1907, I was out there on my place (the Clarence W. Drinkwater, formerly the Frank or P. F. Heinz place) every year; different times, different years. My brother and I owned some cattle and he was caring for the cattle and stock and I had the store at Lawen.

I was out there practically all seasons. Spring season, of course, you could not get out on this tract any other way only in a boat.

To get to my tract at other seasons of the year, outside of the spring season, from my father's place, there was a low piece of ground, sometimes we would have to wait until late in the fall before we could get across (R. 1874) there some years, and other years we would cut across. The higher ground on my side was on the south side (of this 160 acres); it was sort of a ridge, not really a ridge there,

but higher ground between that tract and my father's place; you could walk out there and in high water years we muddled it through there a ways to get out on there to that ridge. We went on horseback or with horses hitched to a mowing machine, or wagon. That is late in the fall we would go out to cut hay.

In the early spring during that seven years, there were some years when we could get out there on that property in the springtime either by walking or on horseback, but not during late spring.

At different times and different years, I have been able to get out on that property on foot, and on horseback, and in wagons.

I do not recall a year that we did not cut hay out there. There was possibly one or two years, but I don't recall now.

The hay we raised was all sugar grass. (R. 1875.)

Mr. JEFF CAWLFIELD, called as a witness for the plaintiff, testified in substance as follows:

When I was living up there (on my father's place) there were settlers south of our place. There was a man by the name of Jason Bennett who had a claim south; C. S. Johnson, Simon Lewis, the Grout brothers, Charlie Adams, Red Campbell, Pete and Scott Haley, and on down there (south) was Mr. Griffin. I knew nearly all of those in there. The places of the people I have named all are within the Neal meander line, and I do not think the lands have ever been surveyed. During the years that I lived there those people lived in there with their families. (R. 1884.) They had the usual farm implements, and cut hay. They had a certain road or roads into the ranches. They went in and out with wagons and by horseback. There were some pretty well marked trails up there. There were some wagon tracks down in the earth anyone could follow.

Mr. BLACKMAR. Q. Was it customary for those settlers who were squatters in there to sell their improvements, to give a deed or some other kind of bill of sale to the property?

A. Well, they just sold the improvements when they would leave; that is all they could sell.

After my father sold out they moved to the south side of the (Malheur) lake with my brother. He had some land rented over there and they lived with him. (R. 1885.) We never bought that property on the south side of the lake which my brother rented. That rented property was known as the Simmons place.

My brother had another ranch but I can not recall the name of it just now. (R. 1886.)

When my father moved over to the place my brother rented, I did not move over there with them.

I lived over there (on the south side of Malheur Lake); I owned a ranch over there, which I acquired in the fall (R. 1886) of 1900 (R. 1887).

I think it is known as the Smyth place now. I traded it to my brother (Frank Cawlfield), and he sold it to D. H. (Rye) Smyth.

SPECIAL MASTER. That was the property of which he was the owner in Cawlfield versus Smyth in 69 Oregon 41?

A. Yes. (R. 1886.)

SPECIAL MASTER. And it is described as certain fractional subdivisions of sections 27 and 28, township 26 south, range 31 east, of the Willamette meridian. Is that where it is?

MR. PECORE. Yes. The fractional subdivisions are lots 3 and 4, of section 27, and lot 4 of section 28, T. 26 S. R. 31 E., south of Malheur Lake. (R. 1887.)

The WITNESS. I got water on my place every year I lived there (R. 1888); some of the water came in from the Blitzen River; when they irrigated the Sodhouse Field it came in that way, and in extreme high water it would back in.

During the time I lived on my place there, it was almost entirely covered with water one year; I think that was either in the fall of 1901 or 1902; I could hardly say whether that water came from the Blitzen River or from Malheur Lake; I think there was lots of it that came from the Blitzen River.

On the Reinemann place the water comes from both ways too; the same way; it comes through the Curtis place, through the sloughs, and runs on the Reinemann place, and some water backs in there too. (R. 1889.)

MR. BLACKMAR. Q. Where this water comes from the Blitzen River and sweeps over that property, does it sometimes gouge out kind of a slough?

A. Oh, no; there is just natural sloughs in there, but it don't wash out any. There is not enough current.

Some years the water stands in those sloughs. (R. 1889.)

As the water recedes it goes out; it does not run out; it gradually moves out. (R. 1890.)

While I lived there on the south side of the (Malheur) lake, I had occasion to go back across up to where I formerly lived with my father. I went there on horseback and rigs. There used to a sort of a road up through there. Some seasons of the year you could not get up through there on account of the high water.

MR. BLACKMAR. Q. Did your family and the Reinemanns and the other neighbors there from time to time get supplies from Burns that came across on that road I have just referred to?

A. No, I think they most all traded at the Narrows.

I do not think I ever went over that road you have referred to through the (Malheur) lake when I went to Burns, I think I always went by the Narrows when I went to Burns. (R. 1891.)

MR. BLACKMAR. Q. In the year 1892—from 1892 to 1900—have you ever had occasion to drive any cattle from the Springer place up to your place in the Swan Lake field?

A. I have drove in there looking for cattle, and I suppose I have driven cattle, and of course, in the fall the cattle would scatter through the tules, and we had to get them in, and I rode in there quite a bit. (R. 1892.)

Cross-examination:

The place that I testified about that I first went to on the north of the (Malheur) lake was right at Swan Lake.

The house was built within fifty yards of Swan Lake on the east side. A ridge ran along there.

Mr. LILJEQVIST. Q. There was a lot of surveyed lands that extended out there. In fact, surveyed lands extended nearly an eighth of a mile south of Swan Lake on both sides, didn't they?

A. Yes; and east of it, and to the west of it.

We lived on that place immediately to the east of Swan Lake. To the south of us there was sort of a lake in there, too. It was quite a ways east, I think (R. 1895), to a lake; right southeast there was a lake.

There was an open body of water to the southeast of where we had our cabin on the east side of Swan Lake. The water in the springtime with reference to the (Neal) meander line, came over it in places; most of the years it did come up in Swan Lake.

Mr. LILJEQVIST. Q. I am not talking about the lake. I am talking about the meander line. I understood you had some land to the east of it.

A. Well, right by the banks of Swan Lake.

Q. And the water came in the spring up to these banks, did it?

A. Yes; some years; not always.

Q. This high point east of Swan Lake, according to this contour map, Plaintiff's Exhibit No. 3, is seven feet higher than the meander line. (R. 1896.)

A. The ridge?

Q. Yes; how far did the water come on the ridge?

A. It didn't come very far.

Q. The meander line is below that. As I understood, you described lands immediately around this little bit of a sort of a bay that was surveyed here. Do you remember that at all?

A. Lands to the east?

Q. Yes.

A. Yes; there are lands to the east. Several squatters there.

Q. Wasn't the land surveyed sort of round that bay there?

A. Around the bay, did you say?

Q. Yes.

A. Well, there was some flats in there.

I have no idea of who owned in those days lots 1 and 2 of section 10, T. 26 S., R. 32 E., north of the lake. There were some boys that settled in there; they were there; I forget what year it was; some boys squatted in there and left before it was surveyed.

The (Neal) meander line in the vicinity of where I lived was just on the south and east side of the ranch.

Mr. LILJEQVIST. Q. Now, in asking about that, where did the water ordinarily come in the spring with reference to that line?

A. Well, on the east it run up over the meander line quite a ways back; I have seen it clear around the north end of the (R. 1897) Swan Lake.

That is in the high years. There was a sort of depression on the east side of the ridge, and when the water got high, it backed up there.

There was hardly any two years it (the water) was the same; in the spring it was different. I saw it out north of Swan Lake there for a quarter of a mile I think in 1899. I have seen it dry clear through there all the way to the south side of the (Malheur) lake.

Mr. LILJEQVIST. Q. I know. It is dry now. I am talking about the years you were in there in the springtime. You didn't see it dry across there in the springtime any time you were there, did you? (R. 1898.)

A. Not entirely.

Q. Did you ever in any year? Were you there in 1899?

A. No.

While I was living there, I do not think I have seen it dry clear across that lake in the springtime.

In the spring of 1893, I do not think there was very much water in there. It did not get up so very high.

The place I had on the south side of the (Malheur) lake (the D. H. (Rye) Smyth place) I sold to my brother, and he sold it to D. H. (Rye) Smyth. I think my brother (Frank Cawlfield) had some litigation with D. H. (Rye) Smyth about that place. I lived on that place before I sold it to my brother, I think in 1901.

I was not a witness in that case (Cawlfield vs. Smyth).

I know where part of the (Neal) meander line is there. (R. 1899.)

Mr. LILJEQVIST. I will put it this way: Isn't it a fact in the normal springtime the water came to that meander line, the backwater of the lake?

A. Well, I think so.

Q. In this whole case the Government is trying to get you witnesses to testify to the fact it is a lot drier than it actually has been, isn't that the fact?

A. I don't think so.

The Frank Dunn place was right in front of the ranch that I was on, on the south side. (R. 1900.)

My mother did not have any place. My wife's mother had the Simmons place, which is right west of the Frank Dunn place; it (the Simmons place) was west and part of it southwest of the place I sold to my brother (Frank Cawlfield).

I did not know exactly where the (Neal) meander line was there on the Simmons place, but just about. The water backed up some on the Simmons place.

I lived on the McCoy place too. I had that (R. 1901) rented.

Mr. LILJEQVIST. Q. Did the water back up there in the springtime from the lake?

A. When it came down through, yes; it backed out over.

When the Blitzen and the Silvies Rivers filled up Malheur Lake, it (the water) went towards the Narrows and ran over part of this McCoy ranch.

Mr. LILJEQVIST. Q. And the Reinemann place, did it do the same thing there?

A. Yes. (R. 1902.)

Redirect examination:

Mr. BLACKMAR. Q. In Mr. Liljeqvist's cross-examination he used one expression there, "normal years." Tell me what you understand he meant by "normal years" and what did you mean in your answer.

A. Well, I don't know whether he meant normal years that run the same.

Q. Yes; I guess that is what he means.

Mr. LILJEQVIST. Take the average of the whole bunch. Put it that way.

SPECIAL MASTER. That would not be normal. (R. 1903.)

Mr. LILJEQVIST. Let's see what he says.

MR. BLACKMAR. Q. Let me ask you this: In all the time you were living down there did you find that this water came to the same place every year?

A. No, sir.

It (the water) varies nearly always; I do not know of any two years the same; sometimes it would be higher and then it would be lower.

Mr. BLACKMAR. Q. During the time that you were living down there did you find that you had some difficulty in distinguishing between the water which came from the Blitzen (River) and the water which came from the (Malheur) lake?

A. Well, early in the spring you could. The water from the Blitzen (River) came in the earliest.

Q. Isn't it true that some years down there you got enough water from the Blitzen (River) to make a hay crop and you never got any from the (Malheur) lake.

A. I think there was.

Q. There were some diversion dams of some kind up there on the Blitzen River, were there?

A. Yes.

Q. About how far were they from your place?

A. There was dams; Dunns had a dam up in there, and there was a dam up in the Sagebrush Field that turned the water out on the west side.

The water of the Blitzen River spreads over a large (R. 1904) area; and it forms a fan shape. (R. 1905.)

Recross-examination:

Mr. LILJEQVIST. Q. Here is a question that was asked you in (the) statement (you gave to counsel for the Government before the trial):

"Q. Do you know where the meander lines were?

"A. I know just about where the first one was.

"Q. Would the water come over the meander line?

"A. Oh, yes."

A. I was talking about the Neal meander line.

Q. When you were asked if the water came over the meander line you said, "Oh, yes."

A. Yes, it did in certain places.

Q. In some places.

SPECIAL MASTER. In certain places. (R. 1905.)

I could not tell you exactly the places that the water didn't come over in the springtime. Of course, there were points where the (Neal) meander line went over high knolls that the water would not go over.

Mr. LILJEQVIST. Q. That would be just a little point?

A. Points, yes.

I testified that the water went over the (Neal) meander line where the sloughs were; where the ground was level it (the water) went over the (Neal) meander line.

Mr. LILJEQVIST. Q. Assuming that there has been some change in the climate for some years: For year after year, and year after year, when you first went into that country, the lake backed up every spring, didn't it?

A. On which side of the lake?

Q. On all sides of the lake.

A. Well, I think it did.

I do not think that the water came to the same place every year. I could not say with reference to the south side of the (Malheur) lake what the difference was in length between where the water ordinarily came and where it did not ordinarily come to. (R. 1906.)

I have no idea of the distance it came or did not come in yards or rods. I am not testifying that the Neal line was not run at ordinary high-water mark around the south side of the lake. (R. 1907.)

Mr. GEORGE W. CAWLFIELD, called as a witness for the plaintiff, testified in substance as follows:

When I was living down there around Swan Lake, we cut hay there; had cattle there, and had the usual farm implements.

There were other settlers in there who had about the same equipment that we had.

We fed the cattle in the wintertime by loading hay on the wagon and hauling it out to them.

Mr. BLACKMAR. Q. But they were fed right there near the Swan Lake Field?

A. Yes, sir.

From the first time I was down in there to the present date, hay has been cut in and about that vicinity (of Swan Lake) where, in 1908, I then lived, and it was fed to the cattle on the ground there.

I have had occasion to travel frequently prior to 1900 from the place where we were located (and lived) up near Swan Lake down to the south side of the (Malheur) lake; I could not tell you how

many trips I made, but it was frequently; mostly in the winter-time, and late in the fall.

Mr. BLACKMAR. Q. Was there a fairly well-defined road down there in those days?

A. Yes.

Q. Wagon tracks?

A. Yes.

Q. And used by other settlers?

A. Yes, sir.

Q. Do you know anything about a road in the western part of the (Malheur) lake through there some place where they used to haul lumber from Burns or from some other place?

A. Yes, sir.

That road came in on the north side (of Malheur Lake) through Lawen and near the place, on west, to where we lived at Swan Lake; through the Haley place, and it came out about the Reinemann place, some place on the south side (of Malheur Lake) (R. 1909.) I have seen some pretty heavy teams taken through there; I went through there several times myself with a ten-horse team, not mules, mostly horses, and hauling some lumber. That was prior to 1900. That road was used for the same purpose by other people.

Mr. BLACKMAR. Q. Prior to 1900 have you also driven cattle from the north side to the south side (of Malheur Lake), or from the south side to the north side?

A. Yes, sir.

Generally speaking, in taking those cattle through we went across through about the Reinemann or Simmons place, and come out by the Haley (place), in through there.

I am familiar with the Reinemann place; I have never seen the water up to the windows of the Reinemann house. (R. 1910.)

(No cross-examination.)

Mrs. ISORA CAWLFIELD, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Mrs. Cawlfield, in the early days when (R. 1911) you lived there, did you ever have occasion to cross from the Simmons place up to the north?

A. Yes, sir.

I have taken that trip many times; I don't know that I have ever gone that way to Burns, but I could have gone that way.

We visited back and forth with some of those people who lived up there north of our place (the Simmons place), and I also lived one year at Swan Lake.

At the time we made the trip, there wasn't any water. That was in the fall of the year. There was a fairly good road through there. We lived for one year up there around Swan Lake on Mr. Jeff Cawlfield's father's place; while we lived up there the Haleys, and Grouts, and Jason Benbow were living in there. (R. 1912.) I think those people lived in there the year round. This does not apply

to all times crossing that (Malheur) lake, because some years, in the spring of the year especially, there was water across there.

The crossings we made were late in the summer and in the winter, after July, along in September, and later.

Mr. BLACKMAR. Q. Were you in the court room at the time that your husband was testifying?

A. Yes, sir.

Q. You heard his testimony with reference to your method of life and of the other settlers in there?

A. Yes.

Q. And does that agree with your recollections?

A. It does, as near as I can remember. (R. 1913.)

(No cross-examination.)

Mrs. MARY GRIFFIN, called as a witness for the plaintiff, testified in substance as follows:

We had hay on my husband's homestead (the Gerald Griffin homestead). We got our water on that place from the Blitzen River and from the (Malheur) lake. There were no years when we got water from the Blitzen River and did not get any from the lake. We have not been able to cut any hay on that place during the last few years. We have not had a crop on Mr. Griffin's homestead since 1923; it has been practically a desert.

During the years that I lived there, from time to time (R. 1934) that place was covered with water in the spring of the year during the high-water season. I have seen our entire property up there covered with water on three occasions; I believe it was in 1895, 1916, and 1918.

The years that we cut hay up there (on the Gerald Griffin homestead) I do not think we got the same amount every year. Of course, I do not remember the exact amount of tons of hay, though, but I think it was less some years especially. The reason for the variance (in the amount) was on account of the water. Some years, of course, there would be more than others. (R. 1935.)

Mr. JOHN W. HEINZ, called as a witness for the plaintiff, testified in substance as follows:

I did not live on my father's place (J. J. Heinz place) all the time. I have been around the (Malheur) lake. I have a ranch just north of Saddle Butte about a mile, just a little bit east of north Malheur Slough. My ranch is not a hay ranch, it is more of a small pasture place. (R. 1937.) I get water on my ranch; it comes down the Nine Mile Slough mostly, and from the foothills and comes into the Slough.

I do not remember just what year I did go up there to live on that ranch, but I think I was 22 years old when I took up that place, right around that neighborhood.

SPECIAL MASTER. Q. And you were born in 1877, and you were 22 years old when you took up that place, so do you think it was 1899?

A. Somewhere along in there, yes. (R. 1938.)

Mr. BLACKMAR. Q. Have you been down here in the western part of this (Malheur) lake where these settlers live and had their homes and cut hay?

A. Well, not very much.

I do not know very much about that country.

I have been around on the north side of the (Malheur) lake, around the Herman Ruh place, and my father's place; Otley's and Showen's (places) and all up through there. (R. 1944.)

Cross-examination:

I did not own any land in the (Malheur) lake and bordering on it.

My father is John J. Heinz. He owns some lands (in there). He was on the stand here a little while yesterday. That is the same John J. Heinz.

I am familiar with my father's place. (R. 1945.)

Mr. W. A. CAMPBELL, called as a witness for the plaintiff, testified in substance as follows:

After I moved into my place (W. A. "Red" Campbell place) we got our crop in and went to work putting up hay. We used mowing machines and rakes which we brought in there. (R. 1971–1972.) Prior to the time I moved in there, I had been living down there on section 3, this side of the (Pacific Livestock) Company Ranch.

We did not have any trouble to amount to anything in getting our rake and mowing machine in there; sometimes we had a little trouble, and sometimes we did not; it was just owing to what luck we had. Once in a while we would get stuck in the mud, but we managed to get through all right. In 1893 we probably put up 50 tons of hay; we never measured it; we would guess at it, you know.

Mr. BLACKMAR. Q. What kind of grass did you find in this place?

A. Well, we found wire grass, and we found this salt grass, and we found tules. Anything we cut we called hay.

In those days I had some cattle down there and some horses. (R. 1972.)

We fed the hay we had down there to the stock, through the winter.

Mr. BLACKMAR. Q. What about 1894; did you cut hay down there that year?

A. Now, as for the years, I am not going to state positively; that is something I never paid any attention to, as to what year, or what day, or week, or anything about it like that. We cut hay most years we were there since 1893.

We had some years down there we could not cut hay on account of too much water, and we had some years when we did not get enough water, but we did not have many of those years that we did not cut hay; there were just a few, maybe four, five, or six, more or less. (R. 1973.)

Francis Griffin has different places down there within the (Lake Malheur) Bird Reserve; he has more than one place. (R. 1974.)

I knew a man by the name of Ed. Grout (R. 1974–1975); he lived right next to my place when I knew him; it joined up with my place; he (Ed. Grout) had a family that lived with him there on his place. Mr. Grout cut hay and fed his stock with the hay there.

I never knew Bud Kidwell except by hearsay until lately. I have heard of him for a good while, but I have not got personally acquainted with him yet. I know him when I meet up with him. There is a place down near my place which Bud Kidwell claims. He (Bud Kidwell) did not have any hay on his place in those days; he was not there at that time; he came here lately. (R. 1975.)

When I went in there in 1894 and for four or five years immediately following that, I got most of my grub from Charlie Haines down at the Narrows. I have seen lots of times, most of the time, when I could drive from my place down to the Narrows through the (Malheur) lake; in fact all the time that I wanted to go down there.

Mr. BLACKMAR. Q. And when you went down to Charlie Haines' place to get your grub, or to buy something down there, why, you would just go right on down through the (Malheur) lake?

A. I would go out the road, and go on down; and when I came back I came back the way I went out.

From the time I went in there (1893), and for a few years following that, once in a while I and the other people (down there) would go to see (visit) one another, and to do that (R. 1979) I walked when I felt like it, or rode a horse when I felt like it, and if I wanted to go on a wagon, I could go on a wagon (R. 1980).

Cross-examination:

I would go out (of my place) in the spring of the year; that was when I would go out; along in March sometime, sometimes later. At the time it would break up in the spring, I would take my stock and go out. I came back at haying time when the hay was ready to cut. Sometimes that would be late, sometimes it would be in July; sometimes it would be later; in August sometimes. (R. 1980.)

Mr. LILJEQVIST. Q. From your observation did it (the water) ordinarily cover all of your land?

A. Well, it done it maybe four or five times during the length of time I have been there; but it wouldn't, you might say, not all even then; there will be probably a knoll or two sticking out of the water.

The floor of the house that I have is mighty near on the ground; may be four inches (above it), and maybe not that much; it may have been a little over. That is something I never measured.

Mr. LILJEQVIST. Q. You said you saw the water mark two times in your house. About how much higher than the floor were they?

A. I guess from four to five inches, probably; maybe the width of your hand.

I have claimed that land (the W. A. "Red" Campbell place) over since I went in there. I should have to guess the number of acres I have fenced; probably between 400 and 500 acres I have under fence; maybe not that much, and maybe more. (R. 1981.)

I do not know under what claim I settled on that land. I went in there and they were to survey this land and then I put a homestead on it, but the Government never surveyed it, but I still have the homestead. The Government has not surveyed it yet. I do not know that they (the Government) has ever recognized my rights. I think I will get it (the land) if I live long enough.

Mr. LILJEQVIST. Q. Has anybody ever promised you from the Government that you would get it?

A. Has anybody promised me that I would get it from the Government?

Q. That the Government would give it to you?

A. They didn't promise me, but they told me that the Government would do it.

Q. Who did that?

A. I don't know how many told me that. You might say everybody that I talked with about it; they all told me that they will give it to me.

The area of the land that I live on which was under water in the springtime depended upon the amount of water that we got. (R. 1982.) Most of it probably would get under water, when there was enough water to say anything about.

Mr. LILJEQVIST. Q. If you had any water to say anything about, it usually got over most of your land, is that the idea?

A. It got over a good part of it, anyway.

Those other persons' lands (whom he has named) were about the same as mine. Mr, W. Scott Haley's place was about the same as mine.

I do not know what happened to Mr. Grout; they left there, that is all I know. Mr. Griffin is claiming the Ed. Grout place at the present time. That place was about the same as mine.

Mr. LILJEQVIST. Q. And the Bud Kidwell, was that about the same as yours?

A. The upper place. He has got two places there.

Q. I mean down in the (Malheur) lake.

A. Yes; up there what he calls the lake, that is about the (R. 1983) same as mine.

There was a Dunn down there (in Malheur Lake) claiming some lands, and he is claiming it yet. Their land was about the same as mine. Mr. Harper's land was about the same, except it probably might be a little higher. Mr. Pinto Tom's place was about the same as mine. Mr. Huffman had charge of his place; I do not know just now who does claim it at the present time. Mrs. Boller has the place of Pinto Tom.

Vickers got the Alonzo Clark place and that is about the same as mine. Mr. Bennett has the same place. (R. 1984.)

Mr. LILJEQVIST. Q. They were all in the same land?

A. Yes.

Mr. Vickers got the Wilson place.

Mr. LILJEQVIST. Q. Who was the other man you said? Was there a Mr. Howser?

A. Well, there is no Howser.

Q. Was it Hawker? I didn't catch the name, possibly. Do you remember anybody else?

A. Well, the first who located the place was Bennett.

Q. Were their lands about the same as yours?

A. It is all the same place; it has just changed hands, you know.

At an ordinary year, the water would not go over my lands; only just portions of it, you know. I am not there to measure the water to tell you how deep it was. I go off to the hills in the spring of the year with my stock and I stay there until haying time.

In the early days those people got hay, but it has been getting drier and drier and drier since. (R. 1985–1986.)

The land is just naturally overflowed; it requires water to stand on it, and if we did not get the water, we could not get any hay. I do not know that it would have to stand on it, but it has to flow (over it) in order to wet the ground. I think the water would have to be on the land six weeks or two months, maybe, to get a good hay crop; I do not know exactly just how long just to a day; maybe longer. (R. 1986.)

Mr. W. SCOTT HALEY, called as a witness for the plaintiff, testified in substance as follows:

I have lived on my place practically all the time since 1893, excepting in the spring of the year when the water was out, we moved out in order to let the grass grow.

I did not have any family; I had my mother and sisters to look after, but they did not live on my place.

Mr. Red Campbell moved in there (next to the Scott Haley place) the same day that I did. (R. 1988.)

There were only probably about 200 acres of my 400-acre place which was a hay crop; the balance was in a pond and slough, or a channel which we called it, that led off toward the Narrows.

We cut hay on part of the 200 acres, on which we had a hay crop, not all of it.

Since 1893, there has been about three years when it was impossible to cut hay there on account of the water.

We did not get a crop of hay down there this year, but we got part of a crop last year.

While I lived down there on my place, I planted a garden of vegetables, and some of those other people down there had vegetable gardens, but not all of them.

We had roads to go in and out of there. (R. 1989.) The road ran near my place. From my house I could see people who passed along that road.

Mr. BLACKMAR. Q. Tell me whether or not the people who lived down there, where Reinemann and Dunn, and the others down there lived, whether or not they used that road?

A. Yes. You could go across the (Malheur) lake.

They could go to Burns that way.

I remember, during the time I was down there, of some pretty heavy hauling on that road with big teams. Last year and the year before there was considerable hauling through there with six and eight horse teams.

Mr. BLACKMAR. Q. I am not talking about now, but back in the early days, between 1893 and 1900.

A. Oh, the roads that were traveled then, and up until 1917, were made during the dry season, and packed down, so that we could go through there most any time that we wanted to, and follow the road; that is the way we used the road; and in the dry (R. 1990) season we did go clear across there in an automobile, as fast as you wanted to.

I saw the water up to the floor of my house just one season; that was in 1894.

Cross-examination:

The floor of my house was about a foot above the ground. (R. 1991.)

Mr. ALVA SPRINGER, called as a witness for the plaintiff, testified in substance as follows:

At the time that (Neal) meander line was run there were certain settlers who were cutting hay down below that line, and stacking it, and feeding it in the wintertime. That has been going on from the time I have been there (1888) more or less. (R. 2020.)

From time to time I have cut very little hay below the (Neal) meander line; I think I cut a little the first year I was in there, in 1888. (R. 2021.)

Mr. ALFRED L. MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

The Hill boys were not there (Malheur Lake) between 1890 and 1900. (R. 2073-2074.)

A man by the name of J. G. Bunyard was in there then. I do not recall exactly when he did come in there, but it seems to me that he has been in there since 1908, anyway.

Prior to 1905 I knew Mr. Red Campbell; the Vickers boys; the Huffmans.

Mr. BLACKMAR. Q. Were they living out there in what is now the (Lake Malheur) Bird Reserve?

A. Well, they are now, but you said in—you said between 1890 and 1900. They wasn't. Mr. Campbell was, but Mr. Vickers wasn't. I think he bought his land since then.

Q. Who were some of the settlers that you knew out there in the present Bird Reserve, who lived there in 1895?

A. Well, I knew Mr. Red Campbell. 1895?

Q. Scott Haley?

A. Let's see, how many years ago is that. He has been there about forty years.

SPECIAL MASTER. That would be possibly '91.

A. Yes. Mr. Campbell has been there since 1895, and Mr. Scott Haley, and there was—there is other people in there, but they have sold their lands to new settlers and moved out (R. 2074) themselves.

I know that place up there on the north side (of Malheur Lake) which is known as the Swan Lake Field; I have ridden in that field a good many times.

Mr. BLACKMAR. Q. I will ask you whether or not prior to 1895 there was a road or a trail that went up through there, crossing Swan Lake Field, or in the neighborhood of it?

A. Yes; there was.

I have used that road a good many times; I have driven cattle on it; I have ridden horseback on it; and I have done a little bit of teaming on it, but I have ridden horseback on it a great many times.

Mr. BLACKMAR. Q. Were there any other roads or trails east of there prior to 1895 that you remember?

A. Yes, sir; there used to be a road—we used to go across from what we called—I think it was the west line of Red Campbell's, out through a portion of the Swan Lake Field, between that and Mr. Haley's now, and came out close to the Reinemann place. There used to be a road that way across.

I have used that road for cattle, by horseback, and for teaming; mostly when we (R. 2075) would be bringing cattle across from the other side of the (Malheur) lake.

Generally speaking, those roads were open to travel a part of every year; there may have been a few, one or two or three years, they could not have been traveled, on account of them being so muddy, but that was about all the drawback.

Mr. BLACKMAR. Q. Now, when you give that answer, you are including all the time that you have lived here, are you?

A. Yes, sir.

Mr. SAMUEL T. MOTHERSHEAD, called as a witness for the plaintiff, testified in substance as follows:

There was one year, I do not know whether it was in the fall of 1893 or 1894, I was out there around that (Malheur) lake with a threshing machine. We had an old horsepower threshing machine; we did not have an engine; it was horsepower. (R. 2173.) We hitched I should judge four, maybe six, horses to the threshing machine to pull it; I have forgotten now. I think it was four horses we used.

Mr. BLACKMAR. Q. Did you take that threshing machine across the west part of what is now known as the (Lake Malheur) Bird Reserve of Malheur Lake?

A. Yes, sir. On the road that ran from what we call the Adam George place.

The threshing machine had been working north of Malheur Lake; then we came down with it to the Adam George place to that road; then we went across (Malheur Lake) to the Reinemann place on the south side of the lake.

I do not recall whether there was a fairly well defined road down through that part of the (Lake Malheur) Bird Reserve. I know we went across there, and there was a road across there, and people were crossing it. There were wagon tracks along there, but I do not know whether you would call it a well defined road or not. (R. 2174.) I do not know whether other people were using that road about that time. (R. 2174–2175.)

Cross-examination:

We went (with the threshing machine) onto the Reinemann place on the south side (of Malheur Lake), east of the Narrows.

Mr. LILJEQVIST. Q. Did you cross the lake in that fall? Did you cross the full lake in that fall with the threshing machine?

A. Yes.

Q. You hauled it across?

A. Yes.

I think that was late in the fall of either 1893 or 1894, but I am not sure. There was grain all around that lake (Malheur Lake) that year. We threshed all around it, and down onto Mud Lake, and it was pretty late when we got through, probably October.

Mr. LILJEQVIST. Q. You mean the patented lands around the lake?

A. Around the margin of the lake.

I would not call that a grain country; some years it raises good grain, but I would not call it a grain country. (R. 2175.) Other years it either dries out, or it gets too much water, or the frost kills it, or something happens to it. (R. 2176.)

Mr. JOHN MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

I cut hay back inside of the (Lake Malheur) Bird Reserve when I was working for George Marshall, years before I ever owned any property. I would not say as to the years because I have forgotten it, but it was in the early nineties, and I was there off and on until 1910.

There were years from the early nineties down until 1910 when it was not possible to cut hay all over the present limits of the (Lake Malheur) Bird Reserve, like we would during dry years, but you could cut hay then all right on the high knolls. (R. 2232–2233.) If I remember right, we had about four years' dry seasons and about four wet years. There were wet years when I could not cut hay on my own place. That is, without cutting just on the high knolls. I could not cut right across like I would drier seasons.

I got the water on my place from the Blitzen River, the overflow of the Blitzen River.

There were some sloughs or low places leading across my place down toward the (Malheur) lake.

Mr. BLACKMAR. Q. Now, while you were living there on that place, do you remember any years when you got a back-up of water from Lake Malheur?

A. No; I don't remember of any time that the lake ever backed up; but there was a good many years when the (Blitzen) River was so high and so much water coming down from above that we didn't get to cut very much hay. There was years we didn't.

I would not say that there was any current in the sloughs, but there was always a current in the Spring Branch. I never have seen the (Malheur) lake so high but there was a current there, always a running. (R. 2233.) Some of those sloughs on my place probably would run off down into the lower ground, probably into a swamp-like, and eventually go down. You could not tell whether they were running much or not. (R. 2234.)

Cross-examination:

Mr. LILJEQVIST. Q. Now, in these wet years when you got up on a point, how did Malheur Lake look?

A. Well, it looked like a solid body of water, with the exception of the tule islands, the islands that were around over it.

We did lots of hunting. I have been out through all that western half of the (Malheur) lake, but not in the springtime; I would not say I ever went out through there hunting in the springtime. Where we did our hunting was down in the mouth of the Spring Branch and the mouth of the Blitzen River where it runs into the (Malheur) lake. We could take a boat and go down in there.

I have seen the water within about a mile of Windy Point. (R. 2243.) I remember the bank there. I do not know that I ever saw the water on that bank, except where the waves would kind of wash up a little bit when the wind was blowing. I have not seen that bank lately. I do not go out there. I think that bank changed a good deal. It depended on the water. (R. 2244.)

c. 1900–1910

Mr. JOHN GARDNER, called as a witness for the plaintiff, testified in substance as follows:

In 1902, I helped Campbell cut hay right at his place, right around on that island. (R. 276.)

(His (Campbell's) place is situated about five inches on the map, Plaintiff's Exhibit No. 3, south of the Neal meander corner of section 8–17, T. 26 S., R. 32 E., north of the lake. Pecore R. 277.)

The winter of 1905 was a hard one. That was the year I worked for Owen Thompson.

1906 was a good year and it was a wet year. I helped the company hay that year. The water receded and went down again, and we cut hay inside of the (Neal) meander line. (R. 277.)

Mr. LESTER MARION HAMILTON, called as a witness for the plaintiff, testified in substance as follows:

I can recall one particular period that I hunted west and a little south of Saddle Butte in the spring of 1909 in company with two or three others. There was plenty of game and water there. That was outside of the (Neal) meander line. (R. 628.)

Cross-examination:

The year we went hunting at Saddle Butte the water was out on deeded lands; that was in the spring of either 1908 or 1909; in later years, it was very seldom that the water got that far; we have not been able to hunt in that particular place since that time; I hunted over a great portion of Malheur Lake at that one time, but I cannot say that I have hunted just around the northern part during the various times I have mentioned. I have hunted west of Mud Lake. I hunted in the northwest part of Malheur Lake near Mud Lake, and near the Adam George place. I hunted just around the outer edges one afternoon; we found a good place and stayed right there and got all the shooting we wanted. We did not use a boat at Saddle Butte but waded out. (R. 636.)

Mrs. OLLIE DARSEY, called as a witness for the plaintiff, testified in substance as follows:

In the spring of 1907, the water in Malheur Lake at the time I went hunting with my husband (R. 648–650), the water was somewhat higher than when we went back in the fall of that year; quite a bit higher; five or six inches higher in the spring than it was in the fall; that made some difference in the stage of the water. (R. 652.)

Cross-examination:

I am not familiar with the (Neal) meander line or the ranchers right down near the meander line.

I think Clarence Carey's place was on deeded land. I do not think that the water of Malheur Lake flowed back on to those deeded lands. As the lake rose, it came up, of course, but it did not back up and flood that place. That (R. 661) place was flooded by sloughs, and the water that came in from Saddle Butte, I should say. It came down the Nine Mile Slough. I do not think that the lake caused the waters to back up into the Nine Mile Slough. I think the waters of the Nine Mile Slough came from Silvies River. I never did make any observation around Nine Mile Slough to determine whether the lake did back up into it. (R. 662.)

I observed quite a bit of open water in the eastern end of Malheur Lake after you got out of the tules.

Mr. LILJEQVIST. Q. When you got away from the edges of the lakes, and went out toward the center, isn't it a fact for miles around you there was open water?

A. Yes.

Mr. JAMES M. DALTON, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

I have been around Windy Point and from the road there I have looked off and saw water, but never paid much attention to it; I do not know how far away the water was from there, but it couldn't have been very far, not more than a couple of miles from the road. I think that I saw the water there in the springtime of the year, in 1904. I went around those lakes in 1904, 1906, 1908, 1910. (R. 618.) In 1908 I was around Malheur Lake visiting people, and I do not remember the water conditions at that time, nor can I tell you whether it was a normal year or otherwise; nor can I tell you where the water stood around the edge of the lake at that year. (R. 619.)

Q. And you would see a patch of tules two or three miles away, and then you would see another patch of tules?

A. Yes.

Q. But when you got out in the center of that lake the very edges of it were so far away that you could hardly see them?

A. Yes.

Q. And it looked like a vast lake when you were out there in the center?

A. Yes, sir.

I should say it looked like a lake four or five miles across. (R. 664.)

Mr. J. L. CAREY, called as a witness for the plaintiff, testified in substance as follows:

I have seen all of that end of the (Malheur) lake around Pelican Island dry, so that there was no place on Pelican Island that you could not go to by riding on a horse. I have driven cattle to pasture on the edge of the lake. (R. 799.)

Cross-examination:

I have seen the entire (Malheur) lake bed east of Pelican Island dry twice, and maybe more, I don't know; I think I saw it dry in 1924, and once or twice before that, but I do not recall the years. (R. 800–801.) It is dry this year. I saw it in 1889 when it was dry.

Mr. LILJEQVIST. Q. Some of the witnesses said the water went out only a mile, and they saw water; you say there wasn't any water around Pelican Island at all?

A. Around 1888 or 1889 it was dry.

The whole east end of Pelican Island was dry, I suppose, in August or September during the years I have mentioned. (R. 801.) I do not know whether 1889 was the driest year Oregon ever had or not, but I expect so. I do not know whether I have ever seen it as dry prior to the last two years as it was in 1889. After the dry period of 1889 the lake filled up again for quite a while.

The flood waters of the (Malheur) lake came on to my deeded lands and I lived on my homestead off and on until I got my patent

in 1906. After that I never made it my home. I do not own that property now. I do not remember what year it was I moved away from it. (R. 802.)

The way we got our grass land on that deeded property was from the backwater of the lake (R. 802–803); that was all the water we had. The people below me had considerably more water; they would have to; it was closer to the lake. I do not think we were a half a mile from that meander line; I don't know just what the distance is, but didn't suppose it was that far. There is another ranch below me; that is, I think, on patented land, but I don't know.

I am John L. Carey.

I remember John Jordan; he had a homestead entry down immediately south of me.

Mr. LILJEQVIST. Q. And there is a whole half a mile from your lands to the lake, isn't there?

A. There is on that strip of land.

Q. The closest place is on the southwestern corner, where it is about an eighth of a mile to the lake, is that correct? (R. 803.)

A. I didn't think it was that far; maybe it is.

Mr. Jordan got lake water in his land the same as the rest of us, that is the way he raised his crops. I do not know how far down into the lake Jordan's land went. His claim is due south of me, but how long it was or how (R. 804) wide it was, I don't know. I do not know whether anyone claimed lands south of Mr. Jordan.

Mr. BLACKMAR. I do not think it is fair to the witness to assume that it was half a mile, when he says it was an eighth; and that is an irregular tract. Mr. Pecore tells me it is 200 yards to the southwest corner.

Mr. LILJEQVIST. That is about an eighth of a mile. I am talking about due south. It is perfectly apparent on the map here.

Mr. BLACKMAR. I know, but I do not think it is very fair to assume the widest distance. Why not assume the smallest distance?

Mr. LILJEQVIST. I did tell him that it was an eighth of a mile from his southwest corner to the lake boundary. Now, do you remember where it was? (R. 805.)

A. I guess that is right, if they surveyed it, but the way I see it, it isn't.

The water came on one corner of the field, what I supposed was the lake bed. The water came around the Jordan land, down below, all excepting the north side.

Mr. LILJEQVIST. Q. Assuming then that the Neal meander line was within an eighth of a mile from your southwest corner (R. 806) and extended in a direction so that due south of you it was half a mile, it certainly wasn't established too far north, at least, was it?

A. What are you talking about? The shore of the lake or the meander line?

Q. I am talking about the meander line that we have been talking about in this case.

A. I thought you were asking me about the lake coming into my field.

Q. You already said the headwaters came up on a portion of your land.

A. Yes, on one corner, the southwest corner.

Q. All right. And you knew where your southwest corner was, didn't you?

A. Yes.

Q. And the water in normal seasons came up to that point?

A. Yes, sir.

Q. And then south of you it came how far, and how close to your south line?

A. Well, that is as close as it would come to that corner. That is the southwest corner.

Q. Now, I am talking of due south of you.

A. On the Jordan line?

Q. Yes. (R. 807.)

A. Well, I don't know how far that is to the lake there.

Q. The map shows it is half a mile from your land to the southerly end of the Jordon land, and I am trying to find out, according to your recollection where the (Malheur) lake came there.

A. It came up to the south line of Jordan's place. Is that what you want to know?

Q. I am asking you where it did, or did not.

A. I don't know whether it did or did not go north of the south line of Jordan's land.

Q. Assuming then that you don't know where Jordan's lines are, but assuming that the south line of Jordan's line is half a mile south of your line—the lines that you know. Now, I ask you, was the lake half a mile south of your south line?

A. Well, if that line takes it to the edge of the lake, I guess it would, but I thought there was some fractional land between him (Jordan) and the lake, but I am not positive of that. (R. 808.)

Q. To your best recollection, where did the water come in normal seasons due south of you with reference to the Jordan land?

A. That would be a pretty hard question for me to answer, because I don't know whether that half a mile carries it plumb to the lake, or not.

I know where the south line of my property is.

Mr. LILJEQVIST. Q. And I asked you with regard to due south of you, where did the water come in normal seasons of high water?

A. It came up to that Jordan field, but how far, I don't know. (R. 809.)

Mr. WILLIS GEORGE BARDWELL, called as a witness for the plaintiff, testified in substance as follows:

In 1904 I was around the edge of Malheur Lake where what is known as the Red "S" Field. (R. 952.) I was on horseback at the time.

Mr. BLACKMAR. Q. Now, looking out over the (Malheur) lake just tell us what appearance the lake had there in 1904 with reference to water or tules, or whatever else you saw at the time.

A. It had the appearance of being a big swamp. (R. 953.)

Cross-examination:

When I was down there in the Red "S" Field looking over Malheur Lake I did not go on any hill around there. I was below the Red "S" Field.

Mr. LILJEQVIST. Q. Of course, if you stood on the level ground and looked out over the tules you couldn't see anything but tules, could you?

A. No, sir.

Q. High as your head?

A. Yes.

Q. Are you testifying that there wasn't a lot of water all through those tules?

A. No, sir. (R. 954.)

Mr. JAMES HENRY GIBSON, called as a witness for the plaintiff, testified in substance as follows:

In 1908 I took up a piece of property down there near Malheur Lake (R. 1169), and I am still living on that property.

(NOTE.—The James Henry Gibson place is indicated on the map (Plaintiff's Exhibit 3) as a house. A description of the land would be north of lots 11 and 12, section 36, T. 25 S., R. 31 E., south of Malheur Lake. The Neal meander line is the south boundary of his property and it forms the southwestern boundary of his property.—Pecore.) (R. 1170.)

SPECIAL MASTER. Is he within the Neal meander line?

Mr. BLACKMAR. Yes; on the (Malheur) lake bed. (R. 1170.)

THE WITNESS. There is a little cabin on the place, and it was vacant at that time. Mr. William Marshall told me his mother had been living in there for some time. I do not recall how long the cabin had been built. (R. 1170.)

When I moved in there, Mr. Marshall had a place a little north of west of me on that new survey (the Neal meander line). He was inside of that.

Mr. BLACKMAR. Q. And you, as I understand it, attempted to file with the Land Office some time ago, a claim to this property?

A. No, I did not file; I went when I could—I filed notice that I owned this land and gave them the number of this land; I filed notice when I moved off the land, and when I went back and the Land Office was here (Burns, Oregon).

Since 1908 I have fenced the property and put buildings on it, and such as that.

Since 1908 other settlers to the north have built fences and they have houses in there (Malheur Lake) and such as that, and they have fenced the land.

I am a widower now. When I lived in there, I did not have any wife at that time; I have been alone (R. 1171) since I took that place, but it has been my home. I have not planted any crops there, except I plowed up a little piece of land, about quarter of an acre, and put in some potatoes once. We usually get a wild hay crop off the land. There were two or three kinds of wild hay, sugar grass and wire grass, and there is more foxtail now than anything else since it has gotten so dry. I do not think there is any blue stem grass there.

When the water was high, I cut about fifteen acres of hay on the ridge where my house is, every year until the last two or three years, when it has been too dry to grow any hay there; and very little on the other for the last two years, but that is on account of the dry weather. (R. 1172.) I do not know how many seasons I cut hay, but there were two years since I have owned the place that I could not cut hay on the rest of the ranch because it was too wet.

The water I got on the place used to come from the Spring Creek, or Branch as they called it, and the (Blitzen) river together, but the lake backed it up and held it up, and this River would overflow my land and go across into the lake again.

Mr. BLACKMAR. During all these years you were there, were the ranches to the north of you cutting hay and stacking it up there in the (Malheur) lake bed?

A. Yes; yes, sir.

In a good year I would get on my place in the neighborhood of 300 tons of hay and over. I have no livestock down there; I just keep a team that I use. (R. 1173.) I generally sell the hay in the pasture.

To get any hay to amount to anything, it is necessary to have the water go over the top of the land; there might be a little bit of sub-irrigation; not enough to make a crop. (R. 1174.)

Cross-examination:

A corner of my land extends about half a mile north of the Neal meander line; it was left out of the survey; there is a partition fence between my north line and the George Benson place and close to his cabin.

Mr. LILJEQVIST. Q. Now, as I understand, the water comes up two feet on your line right near the Benson cabin.

A. No; down east of my east line.

Q. Does the water come two feet along your entire east line?

A. Well, I don't think it does quite all the way on the north.

My south line is along the meander line. (R. 1175.)

Mr. LILJEQVIST. Q. And how deep does the water get ordinarily when the (Malheur) lake (R. 1175) backs up at the (Neal) meander line on the claim you are holding down.

A. Well, I do not know just how far it has been backed up; right along this (Neal) meander line is where I built, and there is a ridge that runs down that, and it stops at that ridge mostly.

The ridge is north of my house and the water generally stops there. The water is pretty close there to the edge of that ridge beyond the house.

Mr. LILJEQVIST. Q. Right back of that house on the (Neal) meander line, it is a little bit lower?

A. Yes; a little bit lower.

The water comes in there too. I went in there the first of April, 1908; that is when I made my claim there. Since 1908, the water of the (Malheur) lake in the springtime for several years has backed up to that low place just south of my house (R. 1176); I do not know whether the water came out of that (Spring Branch) Creek down across it, but it runs out of that Creek where the lake hauls that Creek up. The lake gets to the level of the Creek at the lower end of it; that backs the water of the Creek up and it flows this way, and I suppose the Creek is a little bit higher than the higher water of the lake, but I have no idea how much.

Mr. LILJEQVIST. Q. Well, when was the last year that the water came up back of your house there?

A. I do not know when the last year was (when the water was) by the lake (house), but the last year I think (there) was water there to amount to anything was in 1929.

I do not know whether we had a normal year in 1922 or 1923.

Mr. LILJEQVIST. Q. Have you had a number of (normal) years since 1920?

A. Yes.

Q. Now, let me ask you this question, Mr. Gibson: Do you claim a water right from overflow of the Malheur Lake over this (R. 1177) property that you have settled on since 1908?

A. I don't know, hardly, about that.

Q. It may be a legal question.

SPECIAL MASTER. That is true.

Mr. LILJEQVIST. Q. Did you file a claim in the (Blitzen River) water adjudication case?

A. Yes; I filed a while back; but a claim for water in the (Blitzen River) Creek. I have been using that Creek a good many years.

I do not claim the benefit of overflowing of my land by the backing up of Malheur Lake. I claim the water from the lake there overflowing that way.

Mr. LILJEQVIST. You are claiming the right to the water from the overflow of the Blitzen (River), then?

A. Yes.

Q. Has the water since 1920 gone south of the Neal meander line, immediately south of your property?

A. Well, there is a slough south of that line there that fills up from this (Spring Branch) Creek in the spring of the year.

Joe Kado owns the patented land on the meander line immediately south of me. (R. 1178.) The Swift Company used to own it. I was in there before Kado came.

Mr. LILJEQVIST. Q. Now, outside of the last few years, how far does the water recede in the fall, the dry part of the year, in a northerly or northeasterly direction from your cabin?

A. It used to not go down any more than half a mile, but now I do not know how far it is. It is a long ways.

When I first went in there the water ordinarily in the fall did not go down half a mile northeast of my cabin. It was down about my line, sometimes inside of it a little ways in the fall of the year. I did not settle around that place until 1908. (R. 1179.) Before 1908 I think there was more rainfall and more snow and more water that came down into the (Malheur) lake. (R. 1180.)

Mr. D. H. SMYTH, Junior, called as a witness for the plaintiff, testified in substance as follows:

Before I was 14 years of age, I used to put up hay on the place my father, D. H. (Rye) Smyth, took in there (Malheur Lake), (R. 1463), but I do not remember the exact year; I was not very old; I was not fourteen years of age.

Mr. BLACKMAR. Q. Well, starting in with your 14th year, which would make it about 1907, for how many years after 1907 have you helped your father down there with the hay?

A. Well, I helped every year excepting when I was away to school or something. Generally every year except when they had it leased out.

I generally helped with haying before I went away to school; I was away to school about four years.

Mr. BLACKMAR. Q. Since 1907 down to the present time, have you been able to get a hay crop on the Rye Smyth place every year?

A. Yes, we always get a hay crop in there, except this last year we didn't get any.

Q. Now, this Rye Smyth place, you (R. 1464) get your water from Malheur Lake there don't you, or do you get some from the Blitzen River?

A. I guess both places; I don't know.

I never was down there (Malheur Lake) in the spring of the year; we always moved out then. I was never down there when the water went down until it was time to hay. (R. 1465.)

The hay consisted mostly of sugar grass. I never saw any salt grass mixed with it.

I do not know how many acres of hay land we have down there.

Some years we put up more hay than we did other years. (R. 1465.)

We used our hay to feed cattle and horses; our own stock; the hay is fed right there near the stack; it is moved from stack to stack. We do not take the hay out and move it up to Happy Valley. (R.

1466.) It is fed right there (at Malheur Lake). I think most of them (the ranchers) feed it right on the ground there. (R. 1467.)

Cross-examination:

I suppose there was a lot more water in the early days than there has been in recent years.

I do not remember how old I was when I was there (on my father's place at Malheur Lake); but it was before I was 13 years old. (R. 1467.)

I have never hunted down there (at Malheur Lake) myself.

I went to the Oregon Agricultural College and became kind of a football player; not a very good one I guess.

Mr. LILJEQVIST. Q. I think we ought to write the nickname the college gave you when you were starring at football.

A. I don't know about that.

SPECIAL MASTER. What is that?

Mr. BLACKMAR. I agree with you, Mr. Smyth. I have a nickname I have been trying to forget for twenty years.

The WITNESS. What did you say, Your Honor?

SPECIAL MASTER. What was the nickname?

A. "Hungry Smyth."

SPECIAL MASTER. We had a "Wildhorse Smith" in California.

Mr. LILJEQVIST. It was wrestling with those haystacks that you got your muscle for the football, wasn't it?

A. I don't know. (R. 1468.)

Mr. JOHN EDWARD LOGGAN, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I have never been in the western part (of Malheur Lake) on the ice.

Mr. LILJEQVIST. Q. You did not figure they had anything in on that ice worth going after to assess, I suppose, in those days?

A. No.

Most of that land was unsurveyed, and we did not have anything to do with that land way back (in the early days). Those improvements were of very little value. I never went to see them anyhow.

Mr. LILJEQVIST. Q. In fact, it was only a place you could stay a month or two while haying, isn't that what it was?

A. I don't know.

I did not go down there at all, nor in back of those (meander) lines.

I assessed home property throughout the county on deeded lands; but I did not go into see those homes inside (of the Neal meander line). I might have assessed them, asking them what their property is. (R. 1485.)

Mr. JOHN W. BIGGS, called as a witness for the plaintiff, testified in substance as follows:.

When I went in there (the west end of Malheur Lake) with Mr. Frank Jordan, in 1902 or 1903 (R. 1488–1492) to see those settlers

(R. 1492) we got around in there different ways. I was down there with a buggy to some of the places, then we went around on horseback through there. (R. 1494.)

Mr. ORIN EUGENE THOMPSON, called as a witness for the plaintiff, testified in substance as follows:

Between 25 and 30 years I have lived on the east side of Malheur Lake close to Windy Point. (R. 1505.)

(NOTE.—This place is located in section 18, T. 26 S., R. 34 E.; which is across the road from section 13. It is shown on the map, Plaintiff's Exhibit No. 3, approximately by Windy Point. His place is about three-quarters of a mile, about 60 degrees east, from the southeast corner of Windy Point.—Pecore.) (R. 1506.)

Since I have lived there, I have had occasion to observe Malheur Lake at Windy Point.

I recall the old well that used to be there. (R. 1506.)

I do not know anything about the (Stauffer) corral. That corral was there before my time.

I remember the bank of the (Malheur) lake about a mile and a quarter from the well.

During all the time that I have lived there, I have never seen (the water of) Malheur Lake over that bank.

Mr. BLACKMAR. Q. During the time you have lived there, at different years and in different seasons of different years, you have seen the (Malheur) lake stand away from that bank?

A. Yes.

Q. At many different places?

A. Yes.

Q. What is the greatest distance that you ever saw Malheur Lake out from that bank prior to 1920?

A. Well, across to Pelican Island I should judge it is about two miles across there. (R. 1507.)

Mr. COREY E. SMYTH, called as a witness for the plaintiff, testified in substance as follows:

I have had occasion to cut hay in Malheur Lake. I was down there the first time in 1903. I cut hay that year for my father (D. H. (Rye) Smyth). I live on that place (the D. H. (Rye) Smyth place) in the winter. (R. 1522.) The whole of my family lives down there in the winter. Part of our place is down there below the Neal meander line.

I believe that place down there is watered from both the (Malheur) lake and from the Blitzen River. We get some water from both when the water is high.

Mr. BLACKMAR. Q. But if you don't have such a good water year, most of the water you get is out of the Blitzen (River), isn't it?

A. Most of it is; yes.

Q. I presume that the part that is watered from the (Malheur) lake is that which is farthest below the Neal meander line?

I have not been in close touch with that property down there of late years. The last time I cut hay down there was in 1921.

Between 1903 and 1921 it has been possible for me to cut hay there (on the D. H. (Rye) Smyth place) every year. (R. 1523–1524.)

Mr. BLACKMAR. Q. Now, directing your attention particularly to that part of it which lies below the (Neal) meander line, have there been some years between 1903 and 1921 that you could not cut hay because you had too much water?

A. No, sir.

We did not get any crop this year.

I know where the Vickers field is.

During the time that I was farming over on my father's place (D. H. (Rye) Smyth) I could not say that they were cutting grass or hay over on the Vickers place every year.

Mr. BLACKMAR. Well, they cut hay frequently over there?

A. Yes.

Q. The fact of the matter is that taking a line from the mouth of the Silvies River and west of there, since 1903, there is a good deal of hay land in there, isn't there? (R. 1524.)

A. Yes.

The hay is cut and put up on the place, then fed to the cattle during the winter. There is very little hay hauled out of there and fed at other places; it is all fed right in there.

I know a place over in the northwest part of the (Malheur) lake called Swan Lake Fields. Mr. Venator cut hay there, but I never did.

Mr. BLACKMAR. Q. As you saw this place of your father's down there from 1903 to 1921, can you tell me whether or not in the spring of the year the high water came to the same point every year?

A. Not the same place; no.

Q. Did you ever see two years when it was the same?

A. Oh, practically.

Q. What two years did you find it to be the same?

A. I don't remember.

Q. Well, generally speaking, did it change from year to year, that is, the high-water point?

A. Yes, some.

Q. And the low-water point changed from year to year?

A. Yes.

Cross-examination:

My father's name is D. H. (Rye) Smyth, and I am a brother of D. H. Smyth, Junior, who testified here to-day.

My father's deeded land was the old Cawlfield land (R. 1526–1527), and the land in front of it and north of it is the unsurveyed land.

I know where the fence line was between Cawlfield and the unsurveyed part in front of it.

Mr. LILJEQVIST. Q. What I want to know is this: What is your recollection from the earliest time that you saw that land as to whether the lake backed up as far as that fence line?

A. I could not say for sure just where it backed to. The water did not move much in there.

You can not tell, hardly, about the water backing up; in the spring of the year when they irrigated the Sodhouse the water does not back up from above, but when they irrigate the Sodhouse in the spring of the year, it comes down through the country; it flows from the Blitzen River.

The first time I saw it was in 1903.

I am 48 years of age, and I was born in 1883.

Mr. LILJEQVIST. Q. When the water quits flowing from the Blitzen, didn't you see where the lake backed up?

A. Yes; that water would be slow about going down in there. (R. 1527.)

Q. Are you prepared to say that the water of the (Malheur) lake in normal seasons, when it backed up, did or did not come to the Neal line there at your father's place?

A. I could not say. It could go past it. It is practically level country.

Q. It would go past it?

A. Yes.

Q. In which direction?

A. It would go south.

SPECIAL MASTER. He said it could do it.

Mr. LILJEQVIST. Q. Did it do it?

A. I don't know. There was water above and below.

The water was practically stilled; it moved a little.

I do ~~not~~ believe that the water of the lake as it flooded finally stopped the flowing of the Blitzen (River). I never saw it stop that. (R. 1528.)

Mr. JAMES J. DONEGAN, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

When we assessed the patented lands it was in the fall. On account of the mosquitoes and the swampy—the muddy condition of the land, it was impracticable (to examine the properties) for assessment purposes until in the fall.

I think that the deeded lands around there were more or less swampy. Of course, there was always evidence—there was naturally water on the land, or there would not be hay on it. You have to have water to get hay. The nature of the land around Malheur Lake is such it has to have flowing water on it. (R. 1534.)

Mr. LILJEQVIST. Q. As a matter of fact, the true swamp areas up the Silvies and Blitzen (Rivers), from time immemorial, it has been a common well-known fact in this country to raise grasses they had to be flooded?

A. Yes.

Q. In other words, subirrigation is not the thing that raises grass?

A. Absolutely not, in my opinion, and I do not believe you could grow a crop of wild grass any place in this country without more or less a flood condition.

Q. In fact, the grasses that grew, grew from time immemorial from flood conditions?

A. That is my opinion.

Q. And it is that kind of a condition that requires their continuance?

A. Yes.

Q. Now, did you go in there along the south side—the southwest side of Malheur Lake after the flood season of the Blitzen (River) had gone by to see where the (Malheur) lake came in the spring?

A. We didn't pay any particular attention to what the water conditions were; when we were there it was dry; it had to be dry for the purpose of assessing.

I was county assessor of this county from 1909 to 1916.

Mr. LILJEQVIST. Q. Do you believe you could have drawn a better line around that (Malheur) lake than Neal did ten years before?

A. I don't know anything about that. (R. 1535.)

Mr. ARCHIE MCGOWAN, called as a witness for the plaintiff, testified in substance as follows:

Most of my hunting expeditions since 1900 were on the north side of Malheur Lake; what I would say would be the west half of the lake, although I have made expeditions to the south side of it in the vicinity of Cole Island—in and around Cole Island. (R. 1551.)

I have been there hunting in the spring and also in the fall.

The first trip in there (Malheur Lake) in 1901 was on a hunting expedition in the spring from the north side of the lake, and we went down with wagons, but we really did what hunting we desired to do really from the shore line.

When I was there in 1901 I was northeast of the Campbell place; we were near the Ruh place; the Campbell place was inside of the (Neal) meander line; he (Campbell) had a homestead there. (R. 1552.)

I have been down there since the Government has erected those posts marking the Bird Reserve. The first year we were down there we were north of those posts, and we did not go south of them.

In the spring of 1901 the water was the highest that I ever saw it in the (Malheur) lake.

In later years I went farther down into the lake. I have been practically all over the west half of the (Malheur) lake.

In 1900 and 1901 when I first started to go down there (in the west half of Malheur Lake) hunting, there were several people living down there, who had their homes there, and some live stock. Quite often I visited some of them from time to time. Down there I knew the Haleys, Campbell, Graves, Creason, Griffin, and some gentleman

by the name of Berry, who had a homestead on the (Neal) meander line just adjoining Graves; between Graves—well, I think it is what is the (Neal) meander line of the lake at the present time. (R. 1558.)

In different years I have seen different stages of water there (in Malheur Lake) and at different seasons of the year and in the same year I have seen different stages of water there.

Mr. BLACKMAR. Q. It would be very difficult for you to say, with any degree of certainty, where the land ended and the (Malheur) lake commenced, wouldn't it?

A. I have seen it that way when you wouldn't really know from the vegetation, and from the water conditions, when you were in what we would call the lake proper; you wouldn't know when you came onto it, because the water was spread out away past the (Neal) meander line, the survey. (R. 1562.)

Cross-examination:

The spring of 1901 was one of the highest water years I knew of; I was there, and the (Malheur) lake was higher than I ever saw it. I was on the north side of the lake that spring in the vicinity of the Ruh place. We stayed there for two or three days and the water was away up.

I was not down to the town of Lawen that spring. I do not know how far the water reached up that way. I was between the Ruh place and the Graves place. I was visiting a neighbor of Ruh's on the west of his place. (R. 1565.)

At that time the water was not higher than the tops of the tules in the lake. (R. 1566.)

Mr. LILJEQVIST. Q. And as a matter of fact, that is what you had to have to make that hay, the flooded conditions?

A. Yes, to make good hay it always had to be flooded.

Q. And they cut in the spread between the high water of the spring and the lowest part of the recession in the fall?

A. I think that is correct.

Some of the individuals I have named lived on surveyed or patented lands. I was quite well acquainted with the Haleys, Creasons, Graves, and Hayes (R. 1570) and those fellows all had patented lands.

Mr. Red Campbell was a true squatter down in the (Malheur) lake; he was a true pioneer. I could not tell you how much land he had above water. He lived there from the time I have known him; he claimed that land; I do not know whether he lived there all the time or not; think he lived there during intervals; I think he was absent from it at times living elsewhere. (R. 1571.)

Mr. WILLIAM DAVID HUFFMAN, called as a witness for the plaintiff, testified in substance as follows:

I have been down on Malheur Lake. (R. 1573–1574.)

I have never owned a place near Malheur Lake, but my two children, a boy and a girl, have a little place down there. It is south and

west of Vickers' place; it is east of Scott Haley's, and north of Charlie Reed's place. (R. 1574.)

We have some 440 acres fenced in there.

It was formerly known as the Joe Hill property. (R. 1575.)

(NOTE.—The Huffman place is about three-eighths of a mile south of the Vickers house. It is named on this map, Plaintiff's Exhibit No. 8, as "W. Huffman," and it is about two miles north of the corner of sections 27 and 28, 33 and 34, T. 26 S., R. 31 E., south of the lake.—Pecore. R. 1574.)

I have wintered on that place for four or five winters. The first was in 1914. I have been there the last three winters, 1928, 1929, and 1930. I have known that place since 1905 or 1906. (R. 1574.) My boy lives there now; but he has not been living there since that time since I have known it. My boy does not stay there all the time, but he is there now. Ordinarily he stays there in hay cutting season, and when we are feeding cattle; feeding time in the winter.

Our operations in there have been confined to hay alone. (R. 1575.)

Mr. BLACKMAR. Q. Since you have been familiar with that property down there, has it been possible to get a hay crop from it every year?

A. Yes; there has been hay cut on there ever since I have been in the country. I don't believe there has been a season that I have been in the country that there hasn't been hay cut on it. I know there has been hay cut there ever since I have been down there.

I put up the hay and stacked it right down on that place. Then during the winter I took my stock down there and fed the hay to it right there on the ground. I usually haul it (the hay) out in the tules if it is stormy weather, so that the tules will act as a protection for the stock. The tules is where the wettest ground is, and where the most water is. (R. 1576.) I have some tules within the area that is fenced.

Three years ago I cut 483 tons of hay. That is a little bit more than a ton to the acre. Last year I didn't put up more than 275 tons.

Mr. BLACKMAR. Q. Now, over in that part of the (Malheur) lake bed where your property is located, are there other areas of the same or similar size to yours within the Bird Reserve which were used as hay land?

A. Oh, yes; there is a lot of hay put up down there.

Q. And has that been true since you have been familiar with the land down there?

A. Yes, sir. (R. 1577.)

There has never been a time since I have been familiar with that property that all of it has been entirely covered with water. I have never seen any evidence of the water having been up to the floor of our house down there, or anywheres near it.

I do not know how long there has been a house on that piece of property that we are now cutting hay on.

Mr. BLACKMAR. Q. Who were your predecessors down there in ownership?

A. Well, a man by the name of Joe Hill willed that property to my wife's sister; and then my wife's sister made a quitclaim deed to my two children.

The Hills obtained the property from a man named Thomas—they called him Pinto Tom, and a man by the name of Hog Smyth owned it before he did. (R. 1578.) I think they claimed it at different times, but I could not swear now as to what they claimed; but that has been my understanding that those people owned it before Joe Hill. It was not patented. It is located within the (Lake Malheur) Bird Reserve. (R. 1579.)

Cross-examination:

That property is unsurveyed. I believe they (my children) claim 440 acres. We have no claim of ownership on it at all. My aunt made a quitclaim deed for it to my children. She got title to it when Joe Hill willed it to her. He (Joe Hill) claimed his title to it by right of possession. He bought it from a man by the name of Thomas, I believe. I did not have anything to do at all with where the fence should be put, and I do not know how they established the fence line; I was not there; I know nothing about that. My son did not have anything to do with it either. (R. 1580.) That is all the explanation I know how to make. My son claims it.

Water is what causes the hay to grow (R. 1581); and the only water I know of that we get on that place comes from the Blitzen River.

Mr. LILJEQVIST. Q. Are you claiming water rights under the present Blitzen (River water) adjudication that is pending (before the State Engineer of Oregon)?

A. I gave Mr. McConnell money to pay for the filings. I don't know whether he used it or not.

Q. You are not claiming any water rights to that land by reason of the flooding of the lands caused by the raising of the (Malheur) lake?

A. No, not from the lake.

I do not claim anything from the lake at all. I do not know that the water backs up over that land; if it does, I do not know it.

Mr. LILJEQVIST. Q. Immediately west of you there is an area that is dry, and you claim that lake water doesn't get on that land?

A. I didn't tell you that it doesn't get onto it.

Q. Do you say that it does or doesn't?

A. I told you if it did, I didn't know it.

Q. The water goes onto it, does it?

A. Yes, sir; and I know it comes from the Blitzen River. (R. 1582.)

I do not know what happens when the Blitzen River meets the water of the (Malheur) lake. (R. 1582–1583.)

If the back water of the lake goes over that land, I don't know it; I do not say that it does not go over it.

When there is high water the ridges are above the water; there are a good many ridges in there.

I do not know how much of that tract which my son is claiming is not covered by water when the water is in there in the spring; I never had it surveyed; I do not know about how much there would be.

I cut grasses in the biggest part of that place. The grass is caused to grow by the flooding of the land by water. Subirrigation is not what makes our hay crop. It is the (R. 1583) overflow from the Blitzen River that makes our hay crop. The water does not have to stand there all the time.

I first knew that land in 1906, and I did not know anything of it prior to that time; I was not on that land before 1906.

Since I have been in this country I know that people above the Blitzen (River) have been taking water out of it and putting it upon the dry land.

Mr. LILJEQVIST. Q. Well, isn't it a fact a great area of land has had waters applied to them by the waters of the Blitzen River up above?

A. I think so.

Q. Have you ever had any water litigation to force them to let the water down?

A. I never have.

Q. Has your predecessor in interest, or your son's predecessor in interest?

A. No.

Q. Or Mr. Hill?

A. No. (R. 1584.)

It is like a network of channels and sloughs through the Joe Hill or Huffman place. The water goes in there and raises up and covers the land and that is where we get our hay. In fact, there is a lake right there adjoining the land. We join the lake for about three-quarters of a mile west and northwest, and it is not the Neal meander (line).

Mr. LILJEQVIST. Q. Then there is another lake, a lake that you admit is a lake?

A. Yes, that I admit is a lake; but then, where we are down there, I can't feature that as a lake at all; that is hay land and pasture land.

I have known that whole country in a general way since 1888.

Since 1888 at times there was lots of water in there and at times there was not so much. (R. 1585.)

I have never attempted to get that land from the Government. (R. 1585–1586.)

I do not know whether any water from the Silvies River reaches that land.

Since I have first known that country I have seen quite a bit of water there.

I do not recall what the condition of the water was on that land in 1901. (R. 1586.)

I do not know how much land there is above the water when the water is in there (on the Huffman place).

There are probably eighty acres on which I do not cut hay (of the 440 acres) that my son has under fence. I cut hay upon all the rest of the land (under fence). The rest of the land is flooded, excepting the ridges; there are some of the ridges I do not cut hay on, and that land I do not cut it on is flooded more than the land I do cut the hay on. It has tules, and that is the reason I do not cut it; the tule area is within the eighty acres (on which I do not cut hay). The ridges in there are also within the eighty acres that I have described. (R. 1587.)

I have seen the water three feet deep in the sloughs over that land. Over the lands where I cut the hay, and not in the sloughs, I have seen the water six inches to a foot (deep); and in some places just barely water over it. I was not on that land in 1888 and 1889. I only knew it in a general way.

I can tell you one year where the water came with reference to the bank at Windy Point. In August, 1888, I went from the Harney side (of that country) down to this spring (Springer's Spring) with George Marshall. He was moving down there at that time, and I remember that he watered his horses, and we stood on this bank at the east side of Malheur Lake about a mile west and a little bit north of Windy Point. (R. 1588.)

I do not know whether my son will or will not get title from the Government to the land that has been fenced; he doesn't know anything about it, and neither do I. He has never filed any claim with the Government, nor has his predecessor in interest that I know of.

Mr. LILJEQVIST. Q. Your theory is that the drier you can get this west end, the best chance you have of getting some hay, is that the idea?

A. Not at all. It isn't any good without water.

Q. It isn't any good without water?

A. No, sir.

Q. But you don't know anything, excepting the water of the Blitzen (River) that goes over there?

A. No, sir; I do not.

Q. And you never saw the Blitzen River stalled, and the (R. 1589) waters come to a dead stop by reason of the waters of the (Malheur) lake that caused the waters of the Blitzen (River) to no longer flow over these lands, is that right?

A. No; I never seen that.

Q. What?

A. I never did see that.

The water on my son's lands looked to be still, but it might have been moving, if I had examined it closely. There are sloughs in there, and I imagine when the water is high that it is moving maybe a little all the time, but I am not sure about it. (R. 1590.)

Dr. Llewellyn Eugene Hibbard, called as a witness for the plaintiff, testified in substance as follows:

Mr. Blackmar. Q. Soon after you came into the country did you become familiar with the Red Campbell place down there?

A. I went to it, but I didn't become familiar with it, and I am not now familiar with it. I visited it, and went up to the house and saw the lay of the ground that it was on. It was rather a dry season that year, and there was not water very (R. 1608) close to it. It looked pretty dry around there, and that was one of the driest seasons we had. I was able to go to it from this side of the lake, from the north side.

Q. How did you get in there?

A. I walked in.

Q. Now, this place where Campbell cut his hay down there, did that have the appearance of permanent land and vegetation?

A. Part of it did, and part of it looked to me as if it had been submerged. A portion of it had been submerged when there was considerable water in the lake. Water up around Pelican Island would have covered most of the ground around there; that would have been my guess. I was never at Mr. Campbell's place when there was very much water in that vicinity, so that I don't know how it would look in one of the years that the (Malheur) lake was fairly well filled up.

I learned (while) sitting here where the Huffman place was, for the first time. I did not know it by that name, I knew it as the Hill place. (R. 1609.)

I am not familiar with the Vickers place by that name. As I passed through there I generally was alone, and not with anyone who resided in that part of the country, and these places that I would come to, where I saw people had been cutting hay, I didn't know who claimed the places, or who were on them, so that a good many of the places I visited, I didn't know whose places they were, and that was so with this Vickers place.

Mr. Blackmar. Vickers seems to have been the original owner; then Tim Crowley.

The Witness. I was a little familiar with that part of the (west half of Malheur) lake, because of the fact that most of the time I spent there I was in a boat, and it was not good boating down in that part of the lake. (R. 1610.)

At certain seasons of the year in the open water west of Cole Island (there is) a kind of a plant, a little weed of a plant, that comes to the surface of the water, and then runs like a vine on the surface of the water, and the leaves lie on the (R. 1611) surface of

the water; it comes up in the summer. It puts on a seed that becomes a very fine food for the ducks. It washes ashore, and I have been there and scooped up a shovel full. It seems to be as good as wheat for ducks; that plant comes over all the water that isn't over three feet deep, and that weed is in the largest body of open water lying west of Cole Island that there is in the (Malheur) lake. Practically all of that open water was covered with this weed at certain seasons of the year. (R. 1612.)

I drank the water from Malheur Lake a very great deal, but I didn't find any injury from it, although it didn't make very good coffee; but Mr. Liljeqvist said it was pretty good. He seemed to like the flavor. (R. 1617.)

Cross-examination:

Mr. LILJEQVIST. Q. These people like Red Campbell whom you have testified about, have you seen them in there?

A. Yes.

I rarely ever saw anybody at those places at the times I would go in there, perhaps because I never was there at haying time. Mr. Campbell was not at home the only time I came up to his house. That season was one of the driest seasons, and I went from the north side in close by Mr. Haley's place, and walked and waded a little with my gum boots and got to Mr. Campbell's place without finding very much water. There was just a little pond of water that I could see from Mr. Campbell's place. (R. 1631.)

Mr. LILJEQVIST. Q. The Government has not done a thing since 1908 with reference to restricting individuals from cutting hay in there (Malheur Lake) and building fences, have they?

A. No, I would say not. The only orders I had during the time I had anything to do with it was to be careful about fires, and ask them not to burn those tules. At the time there was a chance of their getting out, but there were no instructions to ask them not to build fences.

There were no fences placed around the (Neal) meander line by the Government. Year after year the people have put their fences out on there (Malheur Lake). They have been fencing it up more and more, and cutting more and more hay; although I do not know about cutting more hay, but they are cutting the ground farther in. In a general way at least, there was more hay cut inside of the Reserve as time went on. (R. 1638.)

When I went in there in 1899, at that time there was not any hay cut inside the (Neal) meander line to my knowledge. The water was pretty high, unless it was on some of these knolls that did not get covered up, and they only produce salt grass, which was rarely cut for hay. (R. 1639.)

Mr. LILJEQVIST. Q. In innumerable portions of that western part of the (Malheur) lake, you would go into a boat, and find innumerable nests on them, and if you went out to some of them and put any weight on the nests the whole thing would settle down under the water, isn't that correct?

A. The tules had their roots in water at a depth from six inches to three feet. That seemed to be about as far as they could get a hold, and they grew and made a larger and larger bunch; then the wind would wipe it out. The tules would grow six or seven feet tall, and they would lop down, and they tried to build an island, which they rarely succeeded in doing. They would make a matting, on which the birds could make their nests, and it would support them, but not a person, and there was some water underneath that you would sink into if you put any weight on the matting. There were always floating individual tules there, but not anything like chunks, or anything like that. They never floated with a piece of root; the root was very heavy, and it would hold to the bottom, and become deadened, and was no more good.

Q. What is the fact about hunters going out there (Malheur Lake) in the early days and losing their way in the channels on account of the whole country looking alike when they got out into those tules and channels leading out in every direction?

A. It would be very, very easy to lose your direction and have trouble getting back to your starting point.

Q. As a matter of fact, in 1922, wasn't it true that there (R. 1641) were some cloths tied onto the tops of tall sticks that were stuck around there, marking the places that you might go in and cut?

A. I remember distinctly the channel that brings the Blitzen River down, and the Sodhouse Spring, and that is the channel we brought the boat down, and it was in an obscure place, and there was one pole up there with a white flag, and we always looked for it; the whole shore line looked the same; that was only one in particular that I remember of there. I saw some where a trapper made a mark when he wanted to find his place. Sometimes it was an ordinary piece of cloth, and so I have seen at various times those markings, and it was difficult, as you were on such a low level, that everything looked alike, and you couldn't tell how far the mainland was, and it was a long way between those solid tules and the mainland where you could get out and walk home, or walk anywhere you wished.

Innumerable of these game birds nested away out in the surveyed lands. The other birds I spoke of are different in the nature of their nesting, and for various reasons they hung more closely to the islands, while the geese and the ducks were indifferent as to that. Predatory animals have penetrated into the western part (of Malheur Lake) and destroyed nests. (R. 1642.)

Mr. LILJEQVIST. Q. And in the early days when you knew it, they didn't get in there at all?

A. Yes, sir. If the birds were far enough out they couldn't get to them. I learned that Pelican Island had been a nesting place for birds for a good many years, but it has ceased to be. Once they attempted to make their nests there, but they gave it up. (R. 1643.)

Mr. RALPH CATTERSON, called as a witness for the plaintiff, testified in substance as follows:

There is a wide channel there (by my property), they tell me it is the Silvies River. There has been a dispute there, and they have been fighting and lawing over the water as to which is the river channel, on account of the sloughs there. I do not know which is the river channel. They say it is the one that went through our place; they are fighting for water; you know you would say it was, too. You would say that is right.

I get water from the Silvies River on both of my places (the Ralph Catterson place, and the Ralph and Minnie Catterson place).

Mr. BLACKMAR. Q. Does (Malheur) lake water back up in either one of these places?

A. Yes, sir; it does.

Q. In point of time, does that back-up come before or after you get your water from the Silvies River? (R. 1707.)

A. I have seen the water run there at my place at the barn—it comes down in the spring from the Silvies River and sort of runs into the lake and fills and backs. It backs up.

I have cut hay both above and below the Neal meander line.

Salt grass grows in alkali and ridges. I never saw salt grass growing down in those sloughs in wet years. It is on ridges and the like of that. (R. 1708.)

Mr. BLACKMAR. Q. Do you ever remember a year since you were a small boy that there has not been hay cut and stacked within the boundary lines of the Bird Reservation?

A. No, sir; I don't remember.

Q. Always haystacks?

A. Yes; either on one or the other side of the (Malheur) lake.

Q. As you have seen this lake come and go since you lived down there, I will ask you whether or not different years it reaches different heights?

A. Yes, sir.

Q. And what about the recession? When it recedes, does it go back the same distance every year, or does that change from year to year?

A. That is changeable; I never measured it about going and coming from year to year. There are some changes.

It is very seldom you see two years alike.

I remember the occasion when a calf got in some trouble west of Cole Island. (R. 1710–1711.) I am almost sure that was in 1924, in the fall. The water had receded west of Cole Island, it had grown up there with weeds all the way from two inches up to two feet, I would say. The cattle would go out on those weeds, kept going and working their way clear out in there; a man named Ausmus started out there after a bunch of cattle; at that time Grant Thompson and myself and the Ausmuses and Dunns were about the only people running cattle at that time around the lake there to any

extent—and the cattle would go out there, and I went out there after a bunch of them with Ben Ausmus; that ground was soft on top, and it cracked open from six inches to fourteen inches wide. (R. 1711.)

Cross-examination:

I have seen the water at Windy Point stay on the shore's edge all summer, but the depth of it I do not know, I cannot tell the extent that the water in the early days came up to Windy Point; being a small boy I wasn't very much interested in the depth or how far it came up. I have seen the wind raise it to the top of the bank, but as to seeing the water to the top of the bank and staying there, I would not say I did. I have seen the water stay there at the foot of the bank. To my knowledge it did for several years there; I don't know when I can remember back. I don't remember if I saw that (Malheur) lake when I was one or five years old.

Mr. LILJEQVIST. Q. From the earliest time you can remember, where did it ordinarily come in the springtime?

A. It came within a mile, I would say, of Windy Point, west of Windy Point. (R. 1712.)

Q. That is substantially where that present bank is, a couple of feet high?

A. Yes.

I have been back there looking at that bank, and I think it is higher—I think it looks higher to me now than it did in the early days. I never swam a horse to get to Pelican Island but I have swum cattle.

Mr. LILJEQVIST. Q. From your observation of the waters, from the way you remember them from the earliest time until recent years, would you say that bank at Windy Point was the ordinary high-water bank?

A. Yes.

Q. From the time you remember this bank at Windy Point, about a mile west of Windy Point, your earliest recollection up to recent years, would you say that the water ordinarily came up to that bank when the lake raised in the springtime?

A. Yes, I would. (R. 1713.)

Mr. LILJEQVIST. Q. When the lake filled up in the springtime, where did the water ordinarily come upon your deeded lands?

A. I have saw it cover the south place; the one, the Noah Oard place, only the high ridges; it would fill the sloughs, and low places.

It (the water) came above the (Neal) meander line; it did not stay there all summer. I have seen water above the (Neal) meander line all summer, but it was in a slough; what I contended was the river when they asked me about these (water) rights.

With reference to the rise in the water in the spring, and the recession in the fall, I have seen the water all the way from an inch deep to a foot and a half other than in the sloughs; I do not know how deep they were, because it was muddy in the sloughs.

With reference to the water ordinarily going back from the bank west of Windy Point in the fall of the year, I have seen it go way back to Pelican Island and Cole (R. 1714) Island.

Mr. LILJEQVIST. Q. That is in recent years. I am talking about the earlier years.

A. I can not remember that, how far it went back in.

To my knowledge the water has gone back a great deal more in recent years than it did in earlier years. I would say that in the last ten or eleven years it has been drying up; I don't know when it did start drying up, it has been so long I almost forgot about it now. (R. 1715.)

I have been hunting in Malheur Lake, but I never went hunting in the western half of the lake. I hunted in the eastern half.

I would not say how much water went into Malheur Lake that didn't go down the Silvies or Blitzen Rivers in the early days. (R. 1717.) There has been a lot. (R. 1718.)

Mr. GEORGE L. JAMES, called as a witness for the plaintiff, testified in substance as follows:

I remember an occasion of being down at Malheur Lake in August, 1901 or 1902 (R. 1809), putting up hay. I remember crossing in there on horseback at about Scott Haley's place. I started in at Scott Haley's place and went through by Red Campbell's place and hit the Narrows road. I came out on the south side (of Malheur Lake) next to the hill there. I do not know whose ranch it was; there was a ranch or two there; I know I hit the Narrows road there.

After I got on Campbell's place, it appears to me like I went approximately straight south. There was a kind of a road through there—trail, which I followed on horseback. I did not get stuck in the mud and I did not see any mud. (R. 1810.)

Mr. BLACKMAR. Q. Do you recall what year it was that you first saw any haying down there in the west end of what is called Malheur Lake?

A. Well, it was along about that time of the year (August), I think it was that time I went through there (1901 or 1902). (R. 1811.)

(No cross-examination.)

Mr. CHARLES E. DILLMAN, called as a witness for the plaintiff, testified in substance as follows:

I know something about that road that runs down there between Scott Haley's place and the Swan Lake Field, and across to Red Campbell's and south to the Reinemann place. I first became acquainted with it in 1910 (R. 1860), during the haying season in July; when I was helping hay out in that part of the country, naturally I ran across that section somewhat.

At that time I was helping Scott Haley and Mr. Borland hay in there that year.

The Borland place probably joined Haley's on the east, if I remember right.

(NOTE.—That is the property that is known as the W. Huffman place and is shown on the map (Plaintiff's Exhibit No. 3.) It is east of Scott Haley's homestead and the (Malheur) lake; or his settlers claim out there, whatever you would call it.—Pecore. R. 1861.)

We were haying in there probably a month or six weeks at a time, and while I was down there, we camped in there. They had a haying crew in (R. 1861) there and we just camped in there.

I was not acquainted with the Vickers property. I believe that was north and east of there; I was never out to their property and Huffman was not in there at that time. Scott Haley had a place in there, and I saw other houses in there.

To put up that hay, we used the ordinary horse-drawn mowers and rakes, used for that purpose.

I have never been on that road clear across to the Reinemann place; just down on it a ways; across the channel I believe is about as far as I have been.

The time I was in there there were lots of fences in there (Malheur Lake); practically everything I presume was fenced.

I know salt grass when I see it, but none of the hay that we were cutting down there was salt grass. (R. 1862.) They called it sugar grass.

I believe there was some little salt grass on some of those highest ridges down there.

I have not been down there out in the (Malheur) lake that distance since about 1916.

After the first season I was in there, from time to time I helped with haying around over that country, in the same vicinity where I was the first time; sometimes on the south side of the (Malheur) lake, and sometimes on the north side, and the operation was about the same as I have described with reference to the first time; all the same.

I have gone in there for the purpose of hunting. (R. 1863.)

Cross-examination:

I had some surveyed land on Malheur Lake on the Neal meander line (R. 1864); it was patented to me. It is just outside the (Neal) meander line, but I never did know where that meander line was located.

(NOTE.—It is the southwest quarter of the northeast quarter; the southeast quarter of the northwest quarter; the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section 14, T. 26 S., R. 31 E.—Pecore. R. 1865.)

My knowledge of the (Malheur) lake is since the fall of 1909.

I have been hunting ducks out in that area in Malheur Lake where they cut grass in the fall, and I went through that tule area where

they cut grass in the fall. (R. 1865.) We did not go in a boat. I have been out there (Malheur Lake) in the springtime and in the summer, around the north side—around between the sloughs. By the north side, I mean north and east of where my homestead was and out toward the Haley place, the Griffin place, and the Hill place.

There were a lot of sloughs through there; some of those sloughs would be small and then you might find one where it would open up and be quite a little body of water. I did not go out in a boat. We were on the edges shooting ducks. I do not know how deep those sloughs were.

Mr. LILJEQVIST. I want to ask Mr. Dillman if the water in the spring did not overflow the land down inside the (Neal) meander line.

A. Well, it did; yes. (R. 1866.)

I went in there in the fall of 1909 and I was around the country until I went in the Navy in 1917.

Mr. LILJEQVIST. Q. Did it flood it sufficiently to get hay every year during that period?

A. Yes, they cut hay during those years.

The water would raise high enough to flood the land where we cut hay and then it would recede and the hay would grow. Then we would cut it.

The water would start coming in there after the break-up probably in March and April, and raise until it would start to recede I think in the last of May. It would go down until they started growing hay; generally right after the 4th of July, but the water would keep on (R. 1867) receding all the rest of the summer and fall.

I had a place of my own within the (Malheur) lake.

Mr. LILJEQVIST. Q. Now, where was that place that you have been describing?

A. The one we just described on the map?

Q. Can you locate it?

SPECIAL MASTER. He said it was just above the Narrows, and you said it was three-quarters of a mile.

Mr. LILJEQVIST. That was on deeded land?

A. Yes.

The water came in the spring time up on to the deeded land. It came through a slough on the south side. (R. 1868.)

Redirect examination:

The water never did come up to the floor of my house. (R. 1869.)

Mr. CLARENCE W. DRINKWATER, called as a witness for the plaintiff, testified in substance as follows:

I do not know of any other island or other high places or ridges near my place there under (within) the (Neal) meander line. This ridge just west of where we cut the sugar grass, extended west, and I do not know whether it ran through the Scott Hayes tract

at that time or not. The same ridge that extended on to the south side of my tract (Clarence W. Drinkwater, or the Frank, or P. F. Heinz tract) extended west, but I could not say whether it went clear through the Scott Hayes tract, that is, the 160 (acres) immediately west (of my place), but I know he (Scott Hayes) cut hay there practically every year. (R. 1876.)

In order to help that hayland, we cut those tules. I do not know if we set fire to them or not. It was rather dangerous in the fall (to do that) because of so many haystacks. At any rate, we got rid of the tules, and then we had more hay land.

After we cut the hay we stacked it and fed it during the winter months. In the winter months, we took the cattle (R. 1876) there and fed the hay to them right from the stack. To get the cattle in there, we took them right down the county road, the main road lane, and turned in three or four miles south of Lawen through the Otley ranch and turned them in; we had my father's ranch—my father's claim, rented—leased, and turned them right on to that. My claim was just south of my father's claim.

When we came down to that claim, we didn't just drive them on there, we turned them loose on my father's claim which we had under lease. My father's land was a piece of patented land; I think it was short, 100¼ (acres).

After it would freeze up, these cattle would drift down where the feed was; of course, when we turned the cattle in, they would not take that mud very good, they would follow the road down and drift around most of it.

Mr. BLACKMAR. Q. Maybe we could identify that more accurately. He said (R. 1877) he is immediately south of his father's, and here is Robert Drinkwater's patent on that land.

A. I don't think it was patented to my father. He bought it from a man named Hendricks, as I recall.

My father's name was Robert.

(Witness looks at map with counsel.)

Mr. PECORE. The lands which Mr. Drinkwater occupied are a half mile square, and the northwest corner of the tract was located very close to the quarter section corner between sections 20 and 29, of township 25 south, range 32½ east.

The WITNESS. There was a fence between the Scott Hayes place and my place, and then on the north side of my place, there was a fence between my place and my father's place, and I think there was a fence that extended down a ways until it got into the deeper water, or tules, on the east side. I do not recall that we had any fences on the east side. (R. 1878.)

Part of my father's ranch would now be in what they call the Lake Malheur Bird Reserve, and he had that fenced. (R. 1879.)

My father cut hay off part of that place for a number of years. There was a few acres of sugar grass on that land, but I do not just recall how many. (R. 1879.)

Mr. JESSE FARRIER, called as a witness for the plaintiff, testified in substance as follows:

In 1907 I helped a fellow by the name of Scott Hayes and a fellow by the name of Martin Buck or Harry Buck, I don't know which one it was now, to cut hay in the (Lake Malheur) Bird Reserve. It was one or the other of those boys; it was the oldest Buck boy. They took a squatter's right there.

Martin Buck or Harry Buck, I don't know which, was living down there at that time. (R. 1928.)

Mr. JUDD A. WISE, called as a witness for the plaintiff, testified, in substance as follows:

I began to ride around the (Malheur) lake looking for cattle about 1908; later I did some haying down there. I have fed cattle in there. I have never had any hay land in there. (R. 1952.)

I just fed my father-in-law's hay to the stock there one winter. My father-in-law's name was McKenzie. He had a place down there at the Narrows.

SPECIAL MASTER. We identified that place yesterday, or the day before.

Mr. PECORE. Yes, sir; we did.

Mr. BLACKMAR. Yes.

I am familiar with the Culver Marshall, Joe Kado, and Alva Springer homesteads farther on the south side of the (Malheur) lake. In the last few years, I have had occasion to observe the Blitzen River over there.

Mr. BLACKMAR. Q. Tell me how the Blitzen River waters those ranches over there.

A. Well, they put in dams to turn it out of the river to irrigate it. The water spreads out over the land. (R. 1953.)

Mr. JOHN G. DARSEY, called as a witness for the plaintiff, testified in substance as follows:

There was quite a space of open water in there out from the end of Pelican Island, and all around the south side of the (Malheur) lake. There was very little tule of any kind. It was almost all open water, and very shallow. (R. 1960.)

Mr. BLACKMAR. Q. How did you get along with the boat in the tules?

A. To commence with we had bad luck. I had two boats; I had a narrow one, and a small boat to hunt with, so that we could go through cow trails; in going through these tules we would go from one little pond to another, and go through these cow trails where they mashed the tules down; but you couldn't go through with a big boat, as you could only get through there by shoving and pushing the boat, and get from one pond to another.

Q. In going from one pond to another, did you use your poles?

A. Yes; and sometimes we would have to get behind the boat and push it through; and if it was a little deeper, it would be easier

to push it through with a pole rather than to get out and shove it along.

In those days we hunted usually both in the spring and the fall. The spring months that we would hunt in would vary. I had a cousin who lived down (R. 1961) on the Malheur Lake and as a rule, he would write me a letter when the birds would come, and it usually was in March, and it would be clear on to the 10th or 15th of April, but you could not name any certain time when the birds would come in; there was no normal time when they came in; when the break up came, the birds came.

Cross-examination:

That was not early before the spring freshet came; generally there would be a few birds that would come before the spring freshets came; but it was usually when the spring freshets came that the birds came. Generally, the spring freshet would come on during April, May, and June. One year there was quite a break-up in February. Ordinarily the spring freshets came along in March and until April; that is when the spring water would come down.

Mr. LILJEQVIST. Q. Well, didn't the Blitzen (River) come on later, and the Silvies (River), than the high waters from the mountains?

A. Yes.

We had two rises. On the south side it usually (R. 1962) came later than it did on the north side. There were also two freshets; the snow in the low lands went off first on both the Silvies Valley and the Blitzen Valley, and then later on the snow came from the Blue Mountains and the Steen's Mountain.

Mr. LILJEQVIST. Q. And the Steen's and Blue Mountains, they were different with reference to when the water came from them, isn't that correct?

A. Yes; I think so. As a rule it came from Silvies River earlier than it did from the Blitzen (River) side. (R. 1763.)

Mr. LILJEQVIST. There is a place they call Cole Island here in the southeasterly part of the (Malheur) lake, westerly of Pelican Island, about three miles, or a trifle over, running in a northeasterly and southeasterly direction. I will show you that on the map (Plaintiff's Exhibit No. 3). Did you see anything that you recognized above the water that was an island with tules on it, or tule swamp lands? (Indicating to witness.)

A. Where is the Nine Mile Slough, where does that come in?

Q. The Nine Mile Slough is right here, and here is Pelican Island, and here is the (Malheur) lake. (Indicating to witness on map, Plaintiff's Exhibit No. 3.)

A. We passed here, and there was a lot of open water on each side here. (Witness indicating on map, Plaintiff's Exhibit No. 3.) (R. 1764.)

There was water to the east and to the west of it. (Cole Island.) (R. 1965.)

We did not hunt as much on the other side (south side of Malheur Lake) as along on the north side (of Malheur Lake). We went perhaps a little past the Silvies River. I would not say for sure how far we did go, I don't know.

We found channels going through the tules; there were several of them; a person could get lost in there pretty easy by taking the wrong channel with a boat; I will venture to say that there were five or six channels in there. You might call it a channel, but it was just places through the tules where it would lead in.

I was not back up in the western part of the (R. 1967) (Malheur) lake. (R. 1968.)

Mr. W. A. CAMPBELL, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Well, who are some of the old-timers who were down there in 1895 near you? (R. 1975.)

A. There was the Grout boy, and the McKenzies, Elliott, Harper, the Dunns, Pinto Tom, that is what we called him; Thomas was his name, but he was nicknamed "Pinto Tom."

Q. He was the fellow who had a spot on his head?

A. Yes.

SPECIAL MASTER. What was his right name?

A. Thomas Thomas was the way I understood his name. And Joe Hill, Mrs. Boland, Alonzo Clark, a man named Bennett, a man by the name of Wilson. I think that is all. Well, there was a man by the name of Harper, but I think I named him.

All those people who I have just named were living within (what is known now as) the present (Lake Malheur) Bird Reserve.

I remember when Mr. Neal ran his (meander) line around there, and most of those persons I have named, in fact all of them I know anything about, were living on their places at the time Neal ran his (meander) line.

I did not live all the year round on my place. (R. 1976.) In the spring of the year I would take my horses and go to the hills with them. I did not have any place up in the hills, but if I kept my stock on my place, I would have no hay, and I had to get them out of there in order to get the grass to grow; I would go there up in the hills and cut a little wood in the spring of the year.

During all the time I lived down there I did not see the water in the (Malheur) lake over the floor of my house, but I saw the impression of it, and to the best of my memory it happened twice. I could not tell you what years it did happen, as I do not remember what year it was.

Mr. BLACKMAR. Q. Were there any roads in and about your place down there, and around these other places?

A. Yes, sir. In fact, you could go most anywhere.

Q. I am talking now about 1893.

A. Yes. We had a road to go in and out with, yes; we had a road there. (R. 1977.)

The road with reference to my property went outside of the (Malheur) lake—what you people call the (Malheur) lake—out there by Haley's.

Back in 1893 it was termed a lake (Malheur Lake), but it had no business to be called that. I thought it was a frog pond and tules. It lacked a whole lot of being a lake in my estimation. (R. 1978.)

Mrs. MARY MARSHALL, called as a witness for the plaintiff, testified in substance as follows:

I heard my husband's testimony with reference to cutting hay down there in the (Lake Malheur) Bird Reserve, covering various periods of years. (R. 2096.)

Since I first lived down there (Malheur Lake since December 29th, 1902—R. 2096) my husband and various other settlers have cut hay in the (Lake Malheur) Bird Reserve; when I first lived down there we lived on the unsurveyed portion on the eastern part, where Jim Gibson's house now stands; we moved in there, and my husband's brother, Elvin Marshall, had a house there at that time, and we moved in the house, and lived there for several years; it is the unsurveyed portion of section 36, north of where Mr. Kado is. We lived there for about three years, but not all the year around. We turned our cattle out on the ranch in April, and I had a desert claim up where the experiment station is at the present time (near Burns, Oregon), and we would go up there to do my improvement work on the desert claim.

Mr. BLACKMAR. Q. And then when you returned to your house did you at any time ever see any evidences in your house of the water having come up over the floors of the house while you were gone? (R. 2097.)

A. I never did.

I am familiar with the Blitzen River where it comes through our place; I think our place gets most all of its water from the Blitzen River.

We have had crops on our place in years when the (Malheur) lake did not back up; that is when there was not very much water in the (Malheur) lake.

We did not have much of a crop in 1931; pretty good pasture is about all.

That house is not still standing that I formerly lived in; it has been moved away. (R. 2098.)

No cross-examination.

Mr. JOHN EMERY GRAVES, called as a witness for the plaintiff, testified in substance as follows:

I and my brother formerly had a place in the (Lake Malheur) Bird Reserve that we lived on.

We have deeded land above that place. I could not say the number of acres that we have within the (Lake Malheur) Bird Reserve, but I guess it is around 2,000 acres; there are several pieces

of land together; there is a fence between part of it; the lower part that I have fenced I have for winter use. (R. 2100.)

(NOTE.—His (John Emery "Doc" Graves) house is in lot 3, section 35, T. 25 S., R. 32 E.; and the southern boundary of his land in the (Malheur) lake extends, as I understand it, down to a point about a mile and a half north of the Neal meander line in section 26, T. 26 S., R. 31 E.

His fences are shown on Plaintiff's Exhibit 3. The house in which he (John Emery "Doc." Graves) lives is back on patented land about a mile from the (Neal) meander line.—Pecore. R. 2101.)

The WITNESS. I have had a house down there within the (Lake Malheur) Bird Reserve. I wintered there the first winter I was there (1900—R. 2099); I think my brother built the house; I wouldn't say he built it or whether he bought it; at any rate (R. 2101) it was there when I came into the country.

We used the 2,000 acres down there in the (Lake Malheur) Bird Reserve for grazing, cutting hay, and pasture. I have not cut hay every year since 1900; not what you would call hay; I have cut hay every time it has had water; some years I did not have water, and just cut what I call junk; foxtail and weeds, and it makes pretty good hay.

I can not remember that I had too much water any year, but what I could cut some hay.

In the lean-water years I have grazed cattle down there during those years. I am grazing cattle down there now.

My brother planted a little grain there the first or second year we went there, and then this last year, of course, I thought I would try a little grain there in the same place, but it (R. 2102) did not do any good; it was too dry, but he (my brother) raised some nice grain the year he put it in.

The grain we sowed this year we disked in, and harrowed it and sowed it. I should judge the disc would cut about four to six inches.

Mr. BLACKMAR. Is the grain field marked on your map (Plaintiff's Exhibit 3)?

Mr. PECORE. No, sir; it is not.

A. It is not hardly worth showing.

Mr. BLACKMAR. Give me the location of the grain field.

Mr. PECORE. It is about 300 yards south of your pump house, isn't it?

A. Yes, something like that. It was southwest of the house.

Mr. PECORE. On this map (Plaintiff's Exhibit No. 3) about midway between the north and south meander line on the lake, and about two miles south of the south boundary of lot 6, of section 2, township 26 south, range 32 east, north of the lake, is indicated a house, and the grain patch was about 200 yards, as I remember it, southwest of that house.

A. That is right. (R. 2103.)

(NOTE.—The elevation of the grain field will be between 4,092 and 4,093 feet, as nearly as I can estimate the position. Pecore.—R. 2104.)

Mr. BLACKMAR. Q. From your deeded (land) on down south to the deeded land on the other side (of Malheur Lake), has there been a road through there?

A. Yes, sir. It runs right through the ranch.

Q. How long has that road been there to your knowledge?

A. Well, it has been passing through there almost every year. Of course, some years there was only horseback, or sometimes a rig that would go through there most any time, late in the fall, after the water began to recede.

Of late years I have been able to use that road all the year round. I came right across it yesterday. (R. 2105.)

Along about 1920 is about as far back as I can remember that it was a general pathway. That road has been generally used by the public; there is a lot of travel coming through there; it is kind of a cut-off coming this way (towards Burns, Oregon).

We have (water) filings to get the (water on my) deeded land from the Silvies River. (R. 2106.)

There are a few sloughs on my deeded land, which fill with water from the Silvies River.

Since I have been in there I think that I have seen the (Malheur) lake water come up on my deeded lands. It (the water) practically is in the sloughs; but, of course, when the water is so high, you can not tell hardly where it comes; it probably comes from the (Malheur) lake, but mostly it comes from the sloughs, I would say. The sloughs generally get their water from the Blitzen and Silvies Rivers. (R. 2107.). On my place the sloughs get their water from the Silvies River.

Mr. BLACKMAR. Q. Since you have lived there have you found that in the spring of the year the (Malheur) lake comes up to some definite point every year?

A. Not every year, no.

Q. What is your experience with the lake over the period of years that you have been there as to whether or not it changes from year to year?

A. Well, there has been a big change in the last fifteen years to what it was when I first came in here.

Q. Say we take it prior to 1920.

A. Yes.

Q. In the spring of the year did the water come up to the same place every year on your place?

A. Practically it did; most times.

Mr. BLACKMAR. What is that?

SPECIAL MASTER. "Most times."

A. In those years I say at times it did.

Mr. BLACKMAR. Q. Now, in those years did the water stay down in the sloughs, or did it come all around your land?

A. Well, the land that was level it practically covered it; and those higher places it would still remain open.

There are several of those knolls on my deeded land; it is not all flat.

There is land north of my place that gets some water from (R. 2108) the Silvies River.

Mr. BLACKMAR. Q. Well, when that water comes in there in the spring on the land north of you, then does it come on down to your land?

A. Well, we had a dam in there, yes, sir, that irrigated it, and that put the water over on our land according to our filing.

Q. Then the water would overflow and go on down through these sloughs toward the lake?

A. Yes, sir.

Q. In the big water years up there it was not necessary to confine all the water that came into your land from the Silvies River, was it?

A. No, sir.

It was not desirable either. I did not have any problem of getting rid of the water rather than of getting water onto it. In the big water years I sometimes had too much water there for a general crop, or a big crop. (R. 2109.)

Cross-examination:

Mr. LILJEQVIST. Q. Now, do you know whether any water has been taken out above and put upon the patented lands for (R. 2116) that came down the Silvies (River) in late years as distinguished from the way it was when you first knew it?

A. It surely has been taken out some place. You can see it on the land, and it has never got down to us.

Q. Has there been a marked depreciation in the amount of water that came down the Silvies (River) in late years as distinguished from earlier years, and not counting these recent dry years?

A. It never got there.

Mr. LILJEQVIST. What I am trying to get at is this:

Q. Of your own knowledge, do you know whether in normal times there was water being taken out above, and used in the irrigation of lands, that did not come down to you?

A. Oh, yes.

Q. Which in the earlier days did come down to you?

A. Yes. I am confident of that. Of course, unless they were turned down when they couldn't hold it any longer, and then it had to come.

Q. Until they couldn't hold it any more, they would keep it up there?

A. Yes, sir.

Q. Now, this area out in front of you, down below the Neal meander line, I want you to describe it as you have seen it from the earliest times.

A. Well, 1900 I came here in October, and I went down and wintered in that cabin, and it was practically dry going down (R. 2117) that ridge to that place.

There is a natural ridge there that leads out from my deeded land; there are little sloughs that cross; two or three sloughs, I think.

The next spring the water came in quite a bit and flooded the country naturally like it had before, so they told me.

Mr. LILJEQVIST. Q. Now, this "house," is this the house that is located away out within the fence that you have built there?

A. Is it near the pumping plant as you have it marked?

Mr. PECORE. The word "house" there (on the map, Plaintiff's Exhibit 3) indicates that it is within the fence line.

Mr. LILJEQVIST. Mr. Pecore says this mark here indicating a house is within the fence line which you have built. Is the house near the pumping plant?

A. Yes, sir.

Q. That is the place you wintered?

A. Yes, that is where I wintered the first winter.

Q. And what you call the ridge, was the slightly higher land that led from your place near the engine shown on this map and near this pumping plant?

A. Yes. That ridge describes it very good.

That is where the road is down that same ridge. (R. 2118–2119.)

Mr. LILJEQVIST. Q. Now, go ahead and tell about it as you observed it year after year. I wish you would tell the whole story just as you know it.

A. I don't know just what you want to know.

Q. Just describe what you saw. That is what we want.

SPECIAL MASTER. Do you mean with respect to the road?

Mr. LILJEQVIST. In respect to the water around here on both sides of this elevation, and inside of your field, and down below.

A. Well, the next spring there was a lot of snow and rain that winter above us, and of course, on the other side, too; and if I remember right it went off quite early. The freshets and water came in, and we had to get out; it was in February, I think, and we moved out. The water was coming in, and there was quite a little water to get through, so then we moved out; and we took the stock out. And then it continued that way, and we didn't live in there until the next year. We built a house on the outside; and we were uncertain as to staying in there the year round; and I had taken land on the outside, a homestead in the desert, and it was more convenient out there. We had our stock in there every winter after we cut the hay, and we used it for pasture; we didn't keep them in there in the spring or summertime.

Then we took the stock out and cut the hay. (R. 2119.) We took the cattle out to protect the hay; so that we could cut the hay.

Mr. LILJEQVIST. Q. How much water was in there in the springtime?

A. Well, it varied. Of course, it wasn't the same the first 10 or 12 years, as I remember; maybe 15. There was quite a lot of water in there in the spring.

There were places it (the water) never got over the ridge (that leads out from my deeded land—R. 2018); and then there were other places that it was probably two feet of water. In some places you would have to go through in narrow channels. Part of that ridge never did (become) overflowed. I would say the majority of it, or the biggest part of it never did become overflowed, that is, there might have been probably three inches of water over practically a third of it, and then the other was mostly above water on the ridge.

Mr. LILJEQVIST. Q. Now, do you know when the water got two feet on your gage up there near the house or the barn—that lower gage? (R. 2120.)

A. I don't remember anything about it.

Q. In your judgment, Mr. Graves, this area south of the (Neal) meander line, that has been referred to by some people as a lake, and by some people as a tule swamp: In your opinion, was it a lake or a tule swamp when you first observed it; and on what basis do you make your answer with reference to that?

A. Well, of course, when the water was over it, it looked more like a lake; and then when the water went down and receded, why it was fine land for grazing and pasturing, and cutting lots of hay off of.

Q. In the spring it looked like a lake, and in the fall it looked like a swamp?

Mr. BLACKMAR. No; he didn't say that. He said in the fall it looked like dry land.

Mr. LILJEQVIST. I will put it this way:

Q. In the spring it looked like a lake, and in the fall it looked like dry land?

A. Well, there was quite a difference in it. As the water naturally receded, it was open land, and fine grazing. (R. 2121.)

Mr. JOE ORMAND AUSMUS, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Since the year 1904 has there been any year that you have been unable to cut hay within the land that you held in the (Lake Malheur) Bird Reserve?

A. No, sir.

I did not cut very much hay this past year; it has been pretty dry this year; we cut a little foxtail. In the dry years we used this land of mine for pasture.

This particular year we have planted between 1,000 and 1,500 acres of grain, rye, wheat, oats, and barley.

Mr. BLACKMAR. Is that designated on Plaintiff's Exhibit 3?

Mr. PECORE. Yes, sir; but we haven't distinguished (R. 2129) between the Ausmus and the Otley grain, and the Hayes grain, but it is all marked "Grain Field" with an irregular dot around the outer

boundaries. We couldn't tell where Mr. Ausmus' grain ended and where Mr. Hayes' commenced.

The WITNESS. That grain has been harvested. To plant that grain we used a double disc. (R. 2130.)

I was married just recently and since I have been married I have lived in that house in the (Lake Malheur) Bird Reserve, just part of the time. My father formerly occupied that house. As a boy I lived there, and as a young man I lived in that house before I got married. (R. 2133.) We used to move out of there in the spring; we would take out cattle to graze and be out two or three months, or something like that.

All the time that I lived in that house there I did not see any evidence of water over the floors of the house. (R. 2134.)

Cross-examination:

Mr. LILJEQVIST. Q. Now, you built a lot of fences around a lot (R. 2136) of ground down there—you and Mr. Otley and who else—Mr. Hayes?

A. Yes, sir.

Q. Now, do you claim that land that you built a fence around?

A. Well, I think we might have some claim to it. I don't know what the laws are on that.

The fences were built around that land down where we put the grain in this year to keep the cattle out of the grain.

Mr. LILJEQVIST. Q. And you say you don't know whether you have a claim to it, or not?

A. No, I don't know what the laws are, really, as to that.

Q. Do you own any land on the (Neal) meander line?

A. No, sir. (R. 2137.)

Recross-examination:

The spring and early summer is the flood season, and it lasts perhaps two or three months.

Mr. LILJEQVIST. Q. Well, the (Malheur) lake backed up in those periods, didn't it, in that flood season?

A. The Silvies River comes in there, and there is a channel that runs a mile and a half below the (Neal) meander line, and boats (R. 2138) go up there, and there is a large slough that they use sometimes for boating at high-water times. (R. 2139.)

Mr. JAMES G. BUNYARD, called as a witness for the plaintiff, testified in substance as follows:

In 1904 I and some other members of our family moved on the Griffin tract within the present (Lake Malheur) Bird Reserve (R. 2161), and we were there for two or three days; I imagine it was in about July.

We then moved from there over onto the other side of the (Malheur) lake onto the land my father owned up until he died, which is also in the (Lake Malheur) Bird Reserve. It is known among the

settlers as the Bunyard Ranch. It is the place where the Hill boys now live.

(NOTE.—That is shown here (Plaintiff's Exhibit 3) as the Hill Brothers Ranch, and it is just north of the north boundary of lot 5, section 34, T. 26 S., R. 31 E., south of the lake.—Pecore. R. 2162.

I was on that first place that we moved on most all the time, or a big part of the time, until I got married in 1915.

We did not live on that property all the year round between 1904 and 1915; we generally came down there and put up the hay, anywhere from about the first of August until September. Then after that we would come up there on the "Island," which is about seven miles below the Bell A Ranch, where we generally had a place, and we would stay there a while until we got our cattle together, then we would go down to the end of the (Malheur) lake and winter down there. The "Island" I have referred to is not the one that is on the north side of the (Malheur) lake between certain prongs of the Silvies River. What they call the "Island" here is about seven miles below the Bell A Ranch. (R. 2163.) It is just above the Island Ranch.

We put up hay down there (on the Bunyard Ranch—now Hill Brothers' Ranch) mostly every year since 1904.

We got our water from the Blitzen River. The (Malheur) lake has to get pretty high before we get much benefit from it. (R. 2164.)

John Marshall also got water on his place from the Blitzen River. (R. 2164.)

Mr. BLACKMAR. It may be that you and I do not understand each other on this:

Q. I understood the place you moved to down there was also within the (Lake Malheur) Bird Reserve?

A. The place we moved to when we went there was within the Bird Reserve.

Q. Was that the place you only stayed three days?

A. No. The place we stayed about three days was over by Haley's.

The place we moved onto on the south side of the (Malheur) lake was within the Bird Reserve. That tract is north of the John Marshall tract.

SPECIAL MASTER. I thought he was farther out in the (Malheur) lake but he was nearer?

A. Yes.

SPECIAL MASTER. He had surveyed lands, did he?

A. Yes. He had deeded lands.

There were no years during the time I lived on my property that the (Malheur) lake backed over all of my property (R. 2165); the lake came over part of it.

There were sloughs running through the (John) Marshall place, and down onto our (Malheur) lake land; I could not say that this water (of Malheur Lake) backed up there. The water in the sloughs was generally always moving toward the (Malheur) lake.

While I was living there on that place I had occasion from time to time to go to Burns, Oregon. In making that trip in those days we generally went on horseback, or with a rig and a team. The route we followed generally would go out through the (John) Marshall place, then through what is known as the Sims place to Springer's (place), and then follow up to the county road and come around by the Narrows.

In the fall and in the winter we would go across (Malheur Lake) north through Scott Haley's place, and up that way. In the fall and in the winter there was a pretty fair road up through there. There was quite a bit of travel through there. (R. 2166.)

Mr. BLACKMAR. Q. And at certain times of the year it was used by the public generally?

A. Yes.

Q. During all the time that you lived there?

A. Yes.

SPECIAL MASTER. Was that true? Did you answer the question? Did you say, "yes"?

A. Yes, sir.

I never did plant any grain down there within the (Lake Malheur) Bird Reserve; I have helped the Hill boys down there this year once in a while. (R. 2167.)

Cross-examination:

Mr. LILJEQVIST. Q. In ordinary years this is not a grain country is it, down there?

A. Well, there are places down there that I think a man could raise grain any year.

I do not know whether there have been any grain crop failures down there. I never planted any grain myself.

Mr. LILJEQVIST. Q. Even vegetables are a pretty precarious crop around that lake, isn't that true, on account of the frost?

A. No. Whenever I put in a garden, I have raised a good crop. (R. 2167.)

I do not own any patented land.

The old Sims place was in between the two meander lines (the 1887 meander line, and the Neal meander line of 1895); it does not join the (Neal) meander line on the north. I was back and forth through the Sims place before my father bought it; I do not know just what year he did buy it.

My father is now dead.

Mr. LILJEQVIST. Q. Didn't the water of the lake back up to that Sims place in the springtime?

A. Well, I have seen the water high enough so that you couldn't cut only about 80 acres of it.

The first time I saw the (Malheur) lake there was quite a bit of water in those tules. (R. 2168.) The first time I saw that lake was about 1898 in the spring of the year.

There has been part of the land in the (Malheur) lake that I am claiming, under water.

With reference to when we went on that land and asserted claim to it, I think my father put up hay on that place along about 1906; he has had it ever since and it is fenced; I do not know just exactly the number of acres in it, but I think it is around seven or eight hundred acres. (R. 2169.)

(NOTE.—I have not identified in the record the place where Mr. J. G. Bunyard is now living; the house is marked "J. Bunyard" (on the map, Plaintiff's Exhibit 3), and it lies between a quarter of a mile and a half a mile slightly west of north of the meander corner of the Neal (meander) line, sections 26 and 27, T. 26 S., R. 31 E., south of the lake.—Pecore. R. 2170.)

The land immediately south of me is owned by the Hill Brothers, and it was formerly owned by Judge Hughet.

Mr. LILJEQVIST. Q. I will ask you if it is not a fact that in the springtime when you knew that land, for a great many years the water raised up in the springtime and covered that land?

A. Well, I couldn't hardly say that the water raised up there. There was an awful lot of water in there, but generally that water is a moving.

Q. Well, didn't the lake rise up and stop the overflowing of the waters of the Blitzen (River) at your meander line?

A. No, sir; I couldn't say that it raised up and stopped the flowing of the water.

Q. Well, the two merged into the (Neal) meander line, didn't they?

A. It might have held it up to some extent, but that water generally is always moving, and it doesn't make any difference how high the (Malheur) lake is. (R. 2170.)

Mr. LILJEQVIST. When you first knew it there were a lot of tules in there, weren't there?

A. Well, there was quite a bit more tules then than now.

Q. Wasn't that land inside of the (Neal) meander line a vast body of tules when you first knew it?

A. Well, there were a lot more tules then than there is now. There was more hay to it when I first knew it, too.

Q. Had they been cutting down into it prior to the time you went in there?

A. Well, as to this place of mine, I can't say that it was cut before I went there. (R. 2171.)

Mr. HENRY OTLEY, called as a witness for the plaintiff, testified in substance as follows:

The water I get to raise the hay on my place (the Henry Otley place) comes from the Silvies River.

I have no crops on my place outside of the hay. I never experimented with grain or anything of that kind. (R. 2208.)

During the time that I have lived there on that place I have observed that the sloughs back up from the (Malheur) lake. I am not able to tell what years they backed up; it did back on the lowest forty at the (Malheur) lake, on my individual land. It was back there most every year from 1900 to 1915 or 1916.

Mr. BLACKMAR. Q. When you get the water in there in the spring of the year, do you get a spread all over your entire property?

A. No; there is parts taken up.

Q. Beg pardon?

A. The banks of the slough are out.

SPECIAL MASTER. Do you mean you get it over all your land except the area constituting the slough? What does that answer mean?

A. Yes; the slough banks—well, they might be, oh, 300 yards wide, that we would not get it on the sides of these definite (R. 2209) sloughs.

SPECIAL MASTER. I am not sure that I understand. Does all of your land get water, excluding the area within the sloughs?

A. No; not covered. (R. 2210.)

From time to time I have been down in the west portion of the (Lake Malheur) Bird Reserve, or that portion which lies west of a line drawn (north and south) through Sodhouse Springs; I have visited those ranchers down in there different times. I could not say the first year that I was down in there; I was there in 1918 I believe it was, when we bought hay close to the Narrows; I was down in that country some then. (R. 2214.)

(No cross-examination.)

Mr. HADDEN ELLIOTT, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. Q. Now, in the springtime, or in the spring of the year, or the early summer, May, June, and July, did people cross that (Malheur) lake on horseback or in buggies?

A. Not ordinarily they didn't.

Q. When did they go across that lake, from your observation?

A. Well, when it was dry you could cross through there any (R. 2224) time.

It is hard to tell, between the spring and the fall, when it started to freeze up, about how much the rise and fall of the (Malheur) lake was; sometimes it was a lot more than others. (R. 2225.)

Recross-examination:

From my observation of that country around Malheur Lake it would be a grain country if it was not for the water. (R. 2230.)

Mrs. MYRTLE CALDWELL, called as a witness for the plaintiff, testified in substance as follows:

On that property which I had charge of 25 years ago, until the summer of 1918, north of the old Hughet place, and which is now

known as the Hill boys' place (R. 2291–2292) I cut hay on it, all but just a very few years when it was too wet, but I cut hay every time I could. I also used to take contracts for cutting hay from other people in the Lake Malheur Bird Reserve, and I have cut hay nearly all over that soil, in different years. In the year 1911, I cut hay for Bill Harris. That place is known as the Creason place; and we cut that year one thousand tons of hay on what they call the Creason place now, which is inside the (Lake Malheur) Bird Reserve. We camped right in the (Malheur) lake. (R. 2292.)

I hayed on Julia Hayes' place; that is the McCoy place; and what they call the old Woodcock place; I contracted for the hay for her, and put it up for her; I believe that was in 1916; then I put up hay for Sam Medwinter; that is known as the Francis Griffin place; we put that up in 1919, 1920, and 1921.

All of that hay was cut within the limits of the present (Lake Malheur) Bird Reserve, as near as I know. There was a little deeded land on the McCoy place but the rest of it was all inside the (Lake Malheur) Bird Reserve. (R. 2293.)

Cross examination:

The thing that gave us the hay down there, north of my (Neal) meander (line), was the overflowing of that country in the spring. If it had not overflowed, we would not have had any water for the hay; we would not have had any hay.

The Blitzen River overflowed in the springtime.

Mr. LILJEQVIST. Q. And when it went down into the lake, did the waters of the lake back up?

A. It takes quite a bit of water to make the (Malheur) lake back up.

I own the land immediately north of the Hughet place. The one now owned by the Creasons is a different place. The one back of Hughet is different than the Creason place. The Creason place is just east of the Narrows.

We own some surveyed lands just south of the (Neal) meander line—the place we live on, and we own the whole ranch. (R. 2294.) There is no portion of those two places right on the (Neal) meander line itself. They are south of it. (R. 2295.)

Mr. WILLIAM L. FINLEY, called as a witness for the plaintiff, testified in substance as follows:

I remember where Windy Point is located. (R. 2300–2301.)

(No cross-examination.)

Mr. THOMAS L. VICKERS, called as a witness for the plaintiff, testified in substance as follows:

Neither I nor my brother remained there all the year round on our place (Thomas L. Vickers and brother place). We would run our cattle in the (Forest) Reserve about Harney (Oregon) and we would

feed there in the spring; then we would go back and hay (on our place in Malheur Lake) and then we would stay there and move out in the spring. You could not stay down there in the summer because the horseflies would eat you up, and the stock too.

During the time we lived in there, we would get about by horseback and wagons mostly. I did not walk very much; a buckaroo would not walk very much.

Mr. BLACKMAR. Q. Was that due to the fact that you had too much water, or lack of inclination to walk?

A. I would sooner ride a horse.

During the time that I was in there (on the Thomas L. Vickers and brother place) there were lots of other settlers who lived about the same kind of a life that we did, and they had their places within the present (Lake Malheur) Bird (R. 2312) Reserve.

I own a place down there at the present time. It is not deeded land. It is almost in the middle of what they call the (Malheur) lake. It is on the south side (of the lake).

(NOTE.—His place is just about midway between the Neal meander line and the north and south sides of the (Malheur) lake, and almost due south of the Neal meander corner of sections 3 and 4, T. 26 S., R. 32 E., north of the lake. It is indicated by a dot, which is the sign for a house on this map, Plaintiff's Exhibit No. 3. Around the house is indicated a barbed wire fence, and the name "T. Vickers" is written on the map (Plaintiff's Exhibit No. 3), right near the house. R. 2313.—Pecore.)

My father (Thomas Vickers) and I bought the rights on those ranches in or about 1917, and I have been on that place part of every year since 1917 down to the present date.

I am not a married man at this time. (R. 2314.)

I live there on this place (just described) a good deal of the time, and I have corrals and barns and cattle there same as I did at the other place. I have had them in there all this fall. I moved down there this year on the 18th of August (1931).

I have only a little bunch of cattle now. I sold out a year ago last fall a lot of my cattle. Now I have a lot of horses, but I do not know exactly how many cattle I have. I have what I would call a small bunch, that is about 500 or 600 head.

We usually ran on the other ranch 500 head in there (R. 2314) but I have about 50 head of cattle at the ranch, maybe 65, somewhere between those two figures. I have not all of mine down there; I have about 50 head of work horses and saddle horses beside range horses. (R. 2315.)

Mr. ALPHENA VENATOR, called as a witness for the plaintiff, testified in substance as follows:

I formerly had a place up around what is known as the Swan Lake Field. I located there in 1903, and I sold the place in January, 1909, but remained there until 1912. I had several houses there, and

I lived in there at all seasons of the year. I had a man there during all seasons of the year. (R. 2321.)

I was in the cattle business when I was in there, and I followed the cattle up around there and cut hay. We stacked ordinarily during the year that I had it, about 1,500 or 2,000 tons of hay; it would be hard to estimate, but we ordinarily cut a great area, and we would stack it and leave it on the ground for the cattle to winter on. (R. 2322.)

Mr. GEORGE M. BENSON, called as a witness for the defendant, on cross-examination testified in substance as follows:

Since 1919 I have known a number of people living in the west end of Malheur Lake on those islands; they had their families and homes there; most of them were bachelors I guess. They cut and stacked their hay there and fed their cattle. (R. 2538.)

Mr. COLLINS. Q. On the north side of Malheur Lake up through there toward both branches of the Silvies River, have you found any old tule roots?

A. Yes; found tule roots all over there. (R. 2539.)

Q. Over the lake bed?

A. Over the lake bed.

Q. Have you observed any other kind of old vegetation?

A. There's lots of roots—I don't know whether there was any other kind, it was all roots and just a solid mass of them. If you could get them loose, you could pick up a bunch there as big as that desk.

Some of them were as big as this room, some larger. Just a little tule island. They were anywhere from a few feet to ten or twelve feet in diameter. Some quite large, some small; sometimes two or three small ones together. I found that condition practically all over the lake bed. Where that channel goes through Cole Island, west of that for a ways, it was practically all that hard clay bottom, just a small area in there, probably twenty acres or so. (R. 2540.)

Redirect examination:

The tule roots that I have referred to were bodies of dead masses of tule roots I found in different places in the (Malheur) lake; masses of tule roots—vegetation roots—they looked like tules; they had not grown any green stuff for several years.

Mr. LILJEQVIST. Q. They were by themselves; nothing similar immediately around?

A. No.

Q. Those are the things you have noticed in the bed of the lake this year when the water went dry?

A. Yes; when the water was high, I would run out into something in the lake, I would get stuck, and it would be turf, and it would hold you up, and when you got off from there, it would be all right. I have run on to these many, many times, especially with a good load on. We might have run on to two or three. (R. 2542.)

f. 1910–1920

Mr. CHARLES R. PETERSON, called as a witness for the plaintiff, testified in substance as follows:

The place that I lived on, had possession of, and used from 1910 until 1924 was below the (Neal) meander line. During that period the water came up and covered part of it every year, the middle part. I will tell you how it was. There was a slough that ran through there; and there were tules and water on it, and on each side, and also next to the meander line. (R. 680.) I had a house on it there.

I owned that property from 1910 until 1924, and there was only one year that I couldn't cut hay on it. I will tell you a little circumstance that makes me remember it. I was down there in the spring, the first of April, it was all dry; there had been a dry winter; I set fire to the tules and burned the tules out. After I got them burned out and after the fire was out, because I had a haystack in there at that time and was watching it, I went to Lawen. On my way there I met a fellow coming along the highway and he asked me if I knew who had set that fire. I told him I had. He then told me he was an officer. He instructed me to go back with him to see that the fire didn't do any harm. We went back there and found the fire was all out. The next morning I appeared before the Justice of the Peace (R. 681) and I stated my case to him. He assessed me the minimum fine of $50; when he got through I stated that I was awfully glad to get off that easy and remarked that if I cut that hay this year it would be worth a lot of money to me. In the spring it began to rain and the water came in, and I never mowed an acre of ground in that year.

SPECIAL MASTER. Q. Did he give you back the fifty?

A. No, and I didn't want it.

The property that I am speaking of, I believe, is west and a little south of the Showen place.

(NOTE.—The Showen place is in lot 1, section 31, T. 25 S., R. 32½ E. The property Mr. Peterson is talking about is just below, or inside the Neal meander line, about half a mile to the southwest of the Showen house.—Pecore. R. 683.)

During the 14 or 15 years that I was on that place there were other people cutting hay out in the (Malheur) lake in different places, if I remember right. In the fall of the year I could see those hay-stacks in the lake; there were hay-stacks that remained there for several years. (R. 683.)

Cross examination:

I do not remember exactly the year it was that I encountered the incident with the officer. (R. 683.)

Mr. LILJEQVIST. Q. About how long before you left there in 1924?

A. I think it was about four years, if I remember right.

Q. Now, in 1919, that was quite a dry year, and 1918, wasn't it?
A. 1919 and 1918?
Q. Yes.
A. I think so.

In order to cut hay you have to have water, but that time I got too much water, it went way beyond the (Neal) meander line there.

Mr. LILJEQVIST. Q. Now, it is a fact, is it not, Mr. Peterson, that at ordinary high seasons of that lake that the water did go up to the Neal meander line in that vicinity?

A. Yes, sir.

I think the deeded lands got their irrigation from the overflow on the (Silvies) river. I do not think the water of the lake backed up on those lands in that vicinity. I know when I went in there to hay the (Silvies) river would be down below the banks, and low enough so that it didn't interfere with mowing. (R. 684.) I think the lake would back up into the (Silvies) river. I think the lake would back up past the (Neal) meander line in the spring of the year and I think that was the ordinary condition. (R. 685.)

There was a log building which was built for a granary on what we call the Vickers place. (R. 688.) I bought the improvements from a man by the name of Vickers. (R. 689.)

Mr. LILJEQVIST. Q. Now, there were a great many years you couldn't cut hay on that place until late in the year.

A. We didn't cut it until along toward August.

Q. And the reason you couldn't cut it until August, you had to wait until the water receded?

A. We had to wait until the water receded.

Q. Now, when did the water come in to flood that meander line at that place; about what time in the spring?

A. That depended a good deal on how early the winter broke. I have seen it there one year—I think it was in February—when it began to get backed up.

If the snows melted we would get water in February. After the main run-off, the water would rise, but it was gradual.

Mr. LILJEQVIST. Q. After it got to its peak in a normal spring run-off, how long would it be after that so that it would get down enough so that you could cut hay?

A. It would get to its peak in different seasons of the year. The year I spoke of, when I set fire in there to the tules, the water came in in that year, if I remember right, from April to along in June. (R. 689.)

The water didn't go down that year.

Mr. LILJEQVIST. Q. Ordinarily after you get the peak of the water in the spring, the normal run-off, it would take a month or two before it would lower enough to get out on those islands so that you could get some hay?

A. Yes, sir. (R. 690.)

Mr. GRANT THOMPSON, called as a witness for the plaintiff, on redirect examination testified in substance as follows:

Mr. BLACKMAR. Q. Is your place up there flooded from the Silvies River?

A. Now, I have different places there. Do you mean this particular place?

Q. Yes.

A. Yes, sir.

(NOTE.—This particular place of Mr. Grant Thompson's is located on lots 4, 5, and 6 of section 22, T. 25 S., R. 32½ E., shown on Plaintiff's Exhibit No. 3.—Pecore. R. 725.)

Most of the places on the north side of Malheur Lake are watered from the Silvies River.

In the real wet years when there is a lot of precipitation, it is a problem to get rid of the water.

Mr. BLACKMAR. Q. So that in farming out in this country, you are confronted with dry seasons when you do not get any water, and wet seasons when you get too much?

A. Yes.

I might say, if you will permit me, that it has been two or three years when it would be the middle of August before we could commence haying in the Lawen country (R. 727); that is since 1917 (R. 728).

Mr. JOHN W. BIGGS, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

Along in 1910, 1911, or 1912 (R. 1500), I bought some surveyed lands on Malheur Lake, which I owned until this spring (1931), when I sold them. Mrs. Dr. Denman is the present owner of them. (R. 1499–1500.) They were down just southwest of Saddle Butte; there were two lots there. (R. 1499.)

(NOTE.—They are lots 1 and 4 of section 25, T. 25 S., R. 32½ E., north of the lake.—Pecore. R. 1500.)

They were a little ways apart; one had only an acre or an acre and a half, and the other had 17 or 18 acres in it.

Mr. LILJEQVIST. Q. And as late as 1910 to this spring, will you tell us whether or not the waters of the lake ever came around the edge of those lands—the (Neal) meander line?

A. Well, from the time I first saw those lands up until 1915, I don't think there was ever a year that the lands were not covered with water from the lake for at least three months in the year.

Q. Do you say since January 1, 1921, you have yourself seen water around the Neal meander line from the lake on those lots? (R. 1500.)

A. Since when?

Q. Since January 1, 1921.

A. Yes; in places.

Since January, 1921, I have never been there on the lots when the water was on it, but I was there afterwards when they were cutting hay.

I would judge the water had been there in the spring for the reason there had been one or two hay crops since 1921, but those are the only times there has been any hay on it since 1921.

Mr. LILJEQVIST. Q. Has there been any change in the climate since you first knew the country?

A. Well, from 1893 when I first came here until 1915, we had a great deal more rainfall than we have had since then. 1915 was what we called our first dry year. 1916 and 1917 were a little better. Then 1918 and '19 were very dry, and, while in 1920 and '21 there was a little bit more water, there (R. 1501) has just been the natural drying up since then.

Q. In 1922 did they have a fairly good year?

A. That is what I say, somewhere along there, probably from 1920 to 1922 we had one good year; and maybe another year that was fairly good, but it has just naturally been getting drier.

Q. In your judgment, about how many years of ordinary climate that you used to have is required to make this the same as it used to be?

A. Well, there are several years since I have been here that I can recall that would—either one of those years—that would help put it back very rapidly. There was 1894, 1897, 1904, and 1906 that we had very heavy rainfalls during those years. Now, since that time I don't think we have had as much water as we had either one of those years.

Mr. GEORGE S. SIZEMORE, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

1917 was fairly dry. (R. 1655.)

Mr. ORA WINFIELD HILL, recalled as a witness for the plaintiff, on redirect examination testified in substance as follows:

I bought 160 tons of hay from my uncle on the (R. 1718) south end of Pelican Island, what is known as the Dick Haines place; part of the Dick Haines place. It extends out into the lake.

Mr. BLACKMAR. Q. What year was that hay cut?

A. That was in the winter of 1917 and 1918 I was there, I think; I can not say for sure that was the winter.

Q. What kind of hay?

A. Mixed; quite a lot of salt grass, and wire grass, and very little sugar grass. (R. 1719.)

Recross-examination:

1917 was another very dry year; I drove cattle from one end of Pelican Island to the other that year. (R. 1719.)

Mr. PHILLIP GORDON SMITH, called as a witness for the plaintiff, testified in substance as follows:

I have had occasion to purchase hay down within what is now the (Lake Malheur) Bird Reservation. (R. 1743.) I do not remember the first year I purchased hay down there, I think most of it after 1910, but the first purchase I made was in 1910.

SPECIAL MASTER. Did you purchase any in the nineties, before 1900?

A. I don't think so.

I bought that hay from Billy Dunn, and I bought hay from John Oard, and I bought the hay on Swan Lake one time, also some from Bunyard.

After I purchased the hay I fed it right on the ground, that is, I drove my stock right in there on the ground during the winter.

I think I bought that hay on the Swan Lake Field from Wellington Howell.

I never did cut any hay down there myself (in Malheur Lake).

I have seen those people from whom I bought hay, cutting hay down there, several of them. (R. 1744.) They used mowing machines and rakes and bucks, and the regular way of handling that (hay), the usual farming machinery. They used two horses on one of the mowing machines usually, and two horses on the rakes and four horses on the bucks.

Those people were living in there (Malheur Lake) at that time.

A buck rake is a big machine with a long rake; teeth in it, and they hitch the horses on the side and load from a half to a ton of hay and drag it to the stack; then it is put on a net, and they have a four or six horse team to pull it up on a slide. It is used in connection with stacking hay.

We fed down there during those times generally around three hundred, sometimes four hundred head of cattle. We would carry them through there all the winter. Where I have the pasture, where the hay is, it took about a ton and a half to the animal. We would pasture on that ground where the hay stood. (R. 1745.)

During the years that I was in there (Malheur Lake) feeding my cattle, there were other cattle men in there with their cattle, who were also feeding from hay stacks. They were feeding their own hay.

Every year I was down there, there were always a good many cattle feeding in there (Malheur Lake). I would think there would be anyhow seven or eight thousand head of cattle, take it all the way around the (Malheur) lake.

Mr. BLACKMAR. Q. Yes. Now, I am just referring to the cattle which were fed within the Bird Reserve.

A. Yes.

Q. You would think seven or eight thousand were fed within the Bird Reserve?

A. Yes; probably some outside the line, but right close to it. (R. 1746.)

Cross-examination:

I know about where the survey was run in front of Mr. Springer's place; I was on that jury and heard the testimony.

I knew the land that Mr. Springer settled on. I was on that jury. I did not make any investigation at that time to find out whether the north line of Springer's (place) came to the (Malheur) lake. He (Springer) settled on the land between the lake and the old (1877) meander line.

I was one of those jurors in that case (Springer v. French-Glenn Livestock Company).

Mr. LILJEQVIST. Q. And you tried Pete French, did you?

A. Yes; we heard the testimony. (R. 1747.)

Mr. LLOYD B. CULP, called as a witness for the plaintiff, testified in substance as follows:

The water I get on my place comes from the Silvies River until the lake fills up and backs up; then I get a little water on the place from the backwater. The (Malheur) lake does not get backwater up there every year. (R. 1847.) It has been some time since it has been up there; I don't remember how long it has been since it came back from that way; it has been a long time.

I drained the place so that I could sow alfalfa, and I did have alfalfa there. That is, I put a canal through it, but now I wish I had not drained it. The water is a long way from my place. I had too much water, now I have not enough. The first year I went on my place, part of it was kind of swampy. Where it came up to the (Malheur) lake, it was kind of swamp and I had some tules there, but there is not a tule on the place now; they died out. (R. 1848.)

There was some hay cut on the Showen place, and there was lots of hay cut on the Spurlock place. I cut hay on the Spurlock place twice.

There has not been hay cut every year down there in the (Lake Malheur) Bird Reserve. There are several years now there has not been any cut, because there is no water.

The hay that is cut down there is fed to the cattle unless sold. I guess they sell some once in a while. They feed the cattle right there during the winter months. (R. 1851.)

Cross-examination:

I do not think that the Ausmus place is on patented land, not the land down there next to the (Malheur) lake; I don't think any of his (land) is patented land. I do not think he has any surveyed land there at all.

I know where the Heinz place is and the Showens'. (R. 1854.)

Mrs. MARY GRIFFIN, called as a witness for the plaintiff, testified in substance as follows:

I have a squatter's right within the (Lake Malheur) Bird Reserve, and south of our homestead; I took that squatter's right up there in 1912. It is known as the L. L. Clark place; it adjoins the Francis Griffin place; it is south of Mr. (W. A. Red) Campbell's place.

(NOTE.—It is shown on the map, Plaintiff's Exhibit No. 3, as the L. L. Clark place; on that map that tract is about a mile long, east and west, and approximately a quarter of a mile wide, north and south; the south boundary of it is about half a mile north of the Neal meander line in front of section 29, T. 26 S., R. 31 E.—Pecore. R. 1932–1933.)

I had a house on that place which was already there when I bought the improvements from Mr. Clark.

No one occupied that house only during the haying season when my sons were on the place. (R. 1933.) Since I acquired that place, we have been getting a hay crop there, but not every year. At times, the water was too high, and they never got in there to cut the hay; of course, these last two years we have not been able to cut any hay.

I think there were three seasons when we could not get in there to cut hay. (R. 1934.)

Mr. JOHN W. HEINZ, called as a witness for the plaintiff, on cross-examination, testified in substance, as follows:

I did not go near Cole Island in the springtime (R. 1948); I went in the fall. We did not go right up to it, we went as far as the land so that we could get out.

Mr. LILJEQVIST. Q. Was there a lot of open water east of Cole Island, too?

A. Yes; I think there was. (R. 1949.)

Mr. STANLEY G. JEWETT, called as a witness for the plaintiff, testified in substance as follows:

During the time that I have been in there (Malheur Lake) from time to time I have observed what might be called open water west of Cole Island.

I have gone through that water once in a boat. The occasion of the visit to the so-called Cane Island, I waded or walked. (R. 1997.)

Cross-examination:

When the water was in there (Malheur Lake), I have not been in there with a boat, but I have waded over large areas there. (R. 2005.)

Mr. JOSEPH KADO, called as a witness for the plaintiff, testified in substance as follows:

I have cut hay down on my place (the Joseph Kado place).

I get my water from the Blitzen River, and I do not get any back-up water on my place from Malheur Lake.

I have a mud dam there (in the Blitzen River) that gives me water; the mud dam is on my place.

I was able to cut some hay this year.

The Blitzen River runs through my place, and the dam is in the river.

My place is below the (Sodhouse or Springer's) Spring. (R. 2048.)

Cross-examination:

I did not have two different kinds of run-offs; the floods in the spring of the year when the water comes down is the only flood water. I do not think there are two thaws, one in the lower hills, and one in the Steen's Mountain.

Mr. LILJEQVIST. Q. Do you mean to say in this valley of the Blitzen there have not been all these years two different run-offs, the first melting of all the low lands, and then later on a melting of the mountains?

A. Well, the water from the low lands does not seem to make any floods.

Since 1919 there has been a series of very dry years; 1922 was not a very dry year. (R. 2049.)

I do not claim any water rights from the back water of (R. 2050) Malheur Lake. (R. 2051.)

Redirect examination:

Since 1919 a man by the name of Jim Gibson has cut hay just beyond my place in the (Lake Malheur) Bird Reserve. He (Jim Gibson) has a house there in which he has lived. He is a bachelor, and has no family.

I know Mr. Benson, the Game Warden (for Lake Malheur Bird Reservation). I knew him before he became Game Warden. (R. 2051.)

He has got a place in the (Lake Malheur) Bird Reserve, right adjoining my place. He had that place before he became Game Warden, and I think he squatted on it. He (Benson) lived on that place and cut hay there. (R. 2052.)

Recross-examination:

Part of the time Mr. Benson got his water from the back water of the (Malheur) lake. (R. 2052.)

Mr. LYLE B. HILL, called as a witness for the plaintiff, testified in substance as follows:

My wife, my brother, and his wife, lived with me on the Buckland property (the Hill Brothers—formerly Star Buckland place). (R. 2142.) We lived there in the fall, in the winter time, and in the spring up to the first of April, and then we moved out to go and work with the stock; we would go and work during the growing season. There was too much water to live in there; and we would

come back and put up the hay during the last of July and August; then we remained there through the rest of the year, until the first of April.

Mr. BLACKMAR. Q. When you returned there in the late summer, or the early fall in any year, did you see any evidences of the water having been over the floor of your house?

A. No. (R. 2143.)

FRANCIS W. TRISKA, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Were there certain periods of the year while you were looking after the Bird Reserve that you could go up into the west part of the Bird Reserve on horseback, or on foot?

A. Yes, sir.

Q. And have you done that?

A. Yes, sir. (R. 2200.)

g. 1920–1931

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, testified in substance as follows:

I first arrived at the lakes about the 11th or 12th of April, 1931. At that time the vast majority of the area of Malheur Lake was dry. There was an area of open water about where there is indicated on this map (Plaintiff's Exhibit No. 3) a buffalo skeleton, or about 14 inches on the map south of the southern terminus of the range line between T. 23 S., ranges 32 and 32½ E., north of Malheur Lake, and it embraces probably two or three thousand acres of water in that pond—probably four thousand acres. There was no water flowing in the Silvies River and entering the lake as we crossed it that day. (R. 88–89.)

There was no water entering the lake from the north or east, going along the north boundary of the north meander line over to about the position of Pelican Island and thence southwesterly to Cole Island, where the tower on Cole Island is indicated, which is about six inches on the map north of the north boundary of section 14, T, 26 S., R. 32 E., south of the lake.

There was no water entering the lake from the south or along the south shore, except some artesian wells that we observed. These wells are in sections 4 and 5, T. 27 S., R. 32 E. The flow of water from them is very small.

There was a flow of water from the Sodhouse Spring, and in fact the water was backed up by a dam, which was constructed (R. 89) by some of the ranchers down in front of it, and the channel of the Blitzen River where it crosses the 1877 meander line was pretty well filled, where it enters section 35, T. 26 S., R. 31 E., south of the lake.

Aside from the Blitzen River and Sodhouse Spring, there was no water flowing into Malheur Lake on that day that we observed, and

there was no water in the bed of the lake except the area already described and situated out in the middle of the lake, and some water that was backed up by flooding from the Blitzen River down in sections 25 and 26, and perhaps sections 35 and 36 of T. 26 S., R. 31 E. and probably a small amount of land in front of the Neal. meander line in front of those sections. (R. 89–90.)

During the following two or three months, the water decreased. It gradually dried up until there was practically no open water whatever in the bed of Malheur Lake.

The May and June run-off produced no water for the lake.

This condition continued until the ranchers down near the mouth of the Blitzen River turned loose the water they had dammed up to flood their hay fields, and let it find its way naturally down the channel of the Blitzen and into the lake bed proper, which was done about six weeks or two months ago, and since that time the area of open water out in the bed of Malheur Lake has been very gradually increasing and there is now probably a total area of four hundred or five hundred acres of open water out there now but not in one pond. (R. 90.)

Mr. Thomas George Howser, called as a witness for the plaintiff, testified in substance as follows:

There was not any water in Malheur Lake at all this year. (R. 216.)

Mr. Thomas J. Vickers, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

Prior to 1917 I did not have any place on the (Neal) meander line or any deeded land. The place I now claim is outside the meander line and I have a house on it. This area that I have had my cabin on since 1917 has never been covered with water in the spring floods. This piece of land that I have fenced inside of Malheur Lake contains about 400 acres. (R. 256.) That land has been covered with water, but in a normal season it isn't covered every spring with water. And some years we haven't had any water. This year there is no water. The last few years we have had no water. But we have had water since 1917 in different years. For three seasons we haven't got any crops, since 1917. Some years we had good crops and some years short crops. In order to get hay down there you have to have water. (R. 257.)

Our place is about two miles from the (Neal) meander line. (R. 258.)

Mr. Jeff D. Billingsley, called as a witness for the plaintiff, testified in substance as follows:

At a point that seemed to run back between a couple of sloughs, I have forgotten the name of it, but I think it was Pelican Island and some other island, I would not know them apart and probably

this was one end of them (R. 385), in the fall of the year, I observed some water around these islands. They looked more like sloughs than anything else; there were tules around the borders, and there was some open water out toward Windy Point which would be east of where we were shooting at the time. (R. 385.)

Mr. EMIL BAKER, called as a witness for the plaintiff, testified in substance as follows:

I have crossed Malheur Lake when it was pretty dry; I cannot say exactly the years, but about 1917 or 1918 it was very near dry. (R. 589.)

Mr. JOHN R. JACKSON, called as a witness for the plaintiff, testified in substance as follows:

Three years ago, when I was down at the lake, I had about seven hundred to nine hundred head of sheep, and I was down there about two months until the snow drove me out. I had the sheep down on the east end of Malheur Lake, on the inside of the Lake Malheur Bird Reserve. My camp was about a mile on the inside of the reserve. The lake was just about a mile or a mile and a half away. My camp was not near Pelican Island (R. 621), and I can not tell you how close it was to it.

My camp was out toward Malheur Lake from Windy Point, close to two or three miles from Windy Point. I had moved with my sheep there from the sand ridge. (R. 622.)

Mr. GRANT THOMPSON, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Is it your opinion that the shortage of water in the lake at the present time is due to the shortage in precipitation, rather than from irrigation up the river?

A. I do not think there is any question about it that it is caused by want of precipitation.

Q. That was pretty well demonstrated about 1923, wasn't it? Didn't you have a good water year then when the lakes all filled up?

A. I could not remember as to the years. I told you that my memory is bad on years; we have had those periods of high and low waters. (R. 712.)

Q. When you get the precipitation, then the lake goes back?

A. Yes. (R. 713.)

Mr. MARCELLUS B. HAYES, called as a witness for the plaintiff, on cross-examination, testified in substance as follows:

At our farm this year we found all kinds of buffalo bones (down in the extreme southeast part of the field we have fenced at the present time). (R. 1236.)

(NOTE.—The buffalo referred to as being discovered in the extreme southeast corner of Mr. Hayes' field, that at the present time is fenced,

were found right down in there very close to where there is marked on the map, Plaintiff's Exhibit No. 3, "buffalo skeletons."—Pecore. R. 1236.)

There is no question about them being buffalo bones, because I have been out with my nephew picking out these bones and we pulled out grass. I suppose sometime the buffalo went down and the grass went down with them. It is the wire grass. The buffalo probably were buried. I have an idea when the last brush grew is about when the buffalo died.

I do not think that the buffalo got out there together and broke through the ice. If there was a bunch that went through, there would be some left on the range. Whatever happened to them, it took them all. It is more reasonable to me that they starved to death. (R. 1222.)

Mr. LILJEQVIST. Q. One man in the early days lost 500 head of cattle (R. 1922) in that lake?

A. That was before my time and I did not hear anything about that. I expect thousands of cattle were lost in that lake but not at one time.

If the cattle broke through the ice and got mired down in the water and mud, it would do the same thing to the buffalo; they belong to the cow family.

Mr. LILJEQVIST. Q. You have heard the theory of some of the Government engineers that the grass must have dried up and the buffaloes starved to death in the lake.

A. I never talked to an engineer about that.

Q. It is as plausible that the buffalo went through the ice and drowned in the water and the mud in the wintertime?

A. I would not think so.

I have seen cattle break through, but cows that have any strength at all will climb out themselves; I have helped pull them out, and had the horses break through as far as that is concerned, but I did not happen to be along to pull a horse out. When we went through we had good horses, and if we plunged through, he would get out. (R. 1223.)

Recross-examination:

There was water this year where we found the buffalo heads, at the time we started to farm, and it remained until the wind blew north and south and finally wore it out. (R. 1236.)

Dr. LLEWELLYN EUGENE HIBBARD, called as a witness for the plaintiff, testified in substance as follows:

After the waters of Malheur Lake receded there were some buffalo skeletons found in there. I went down and looked into that. I was not the discoverer of them; I think a Mr. Ruh found the first bones that I know of, but they were found generally. After they were discovered I went down there to see them.

Those buffalo heads were found entirely, so far as my knowledge goes, all in that open water (in Malheur Lake).

When I dug up those buffalo heads I observed the character of the soil in which they were found. (R. 1622.) It was a sedimentary peat vegetation that is formed on top of clay which I found to be underneath, but I did not get any from the clay; they were all in this sedimentary peat stuff, that dug very easily. I did not dig down into the clay, in getting these bones. These bones were on top of what I called the clay.

SPECIAL MASTER. How did you know there was clay beneath, Doctor?

A. When the people were putting in these crops, which was right close to where I was digging for bones, they wanted to get water, and they were going down a distance of five or six feet, and so I examined the hole, and saw what the layer was, and was surprised that it was so shallow, and that it soon reached clay; it was different from what I expected to see so near the surface. I thought there would be a greater depth of sediment. It was what I would call sedimentary vegetation, rather than a clayish material.

The depth of the soil that lay on top of the clay, was less than two feet. I did not identify any grasses in that peat. In digging about (R. 1623) for these bones, I did not dig for any that were not showing. Any bones that showed I dug for; I never started to dig for any unless they were showing; maybe one horn would be out, then I would dig down and get the rest of it; dig down and take out the carcass, and I didn't find anything that looked like grass. I found many parts of tule chunks in various lengths and various states of decomposition.

SPECIAL MASTER. To what depth are you indicating?

A. I would say none longer than 18 inches; and a little past an inch to six inches.

In other words, they were short pieces, and most of them looked very old; they could have been some that settled there in more recent years; they could have been washed in there, and they could have been in there a long time. Apparently that water holds everything, vegetation, bone, and wood in kind of a preserved form. I observed that in fence posts.

Mr. BLACKMAR. Q. Doctor, were you enough of a scientist to be able to distinguish between the skeleton of a buffalo, and the skeleton of a steer?

A. I can easily distinguish between them; yes, sir.

Q. And you have made a sufficient study of it so that you are positive that what you found down there were buffalo bones (R. 1624), and not steer bones?

A. Yes, sir; absolutely. And anybody that might want to do that, let me give them one way to tell. We all know that the buffalo had quite a hump on its back, and the bone formation of a buffalo has a lot to do with that. In our domestic animals there

is nothing to make the hump. The longest bone sticking up from a vertebra in a cow would be that long [indicating]; and the longest in a horse is that long [indicating].

SPECIAL MASTER. Indicate that by measurement.

A. The cow is five inches, and a horse 8½ or 9 inches. I have bones from skeletons that I took, 17, 18, and 19 inches, sticking up from the vertebrae. That is one way to identify them. Another thing, if you only had a head of a cow, there is a seam on the head, and the two halves are divided with a suture; and with the buffalo, it has a well filled out head, while this part is flat. [Indicating.]

I saw enough of these bones and skeletons to convince me it was buffalo, not only that, but the Smithsonian Institution passed upon them, and they are buffalo. (R. 1625.)

Cross-examination:

In 1922 when the party (of State and Government officials, including the witness) went in there, we did not go near Pelican Island.

I can make a pretty close guess of where the water stood that year with reference to the bank at Windy Point. It was about three and a half miles. I would say there was no water east of Pelican Island at that time. I did not go around there, and I do not know whether that was the season I passed around that east end, but from my general knowledge I would say we would have had to stop when we got to Pelican Island. (R. 1637.)

Mr. EMANUEL M. CLARK, called as a witness for the plaintiff, testified in substance as follows:

In 1924 I believe was when they had a big fire there (in Malheur Lake) among the tules. It burned over a considerable area. It was not on the (R. 1738) lake. It was right out in front of the Sodhouse Ranch, in the land we called the marsh—swamp land. It was west and north (of the Sod House Ranch); it was north of the (Reserve) posts, and within the Bird Reserve. A little of that fire burned down there until it stormed and snowed on it; I could not say how many months. I think it was along in May or June when that fire started; when the ground took fire—the ground was burning. After we got the fire put out around the tules, the ground took fire; the tule roots and grass roots took fire and it caused it to burn until the storm came and put it out. That ground is something like peat, and it makes a pretty hot fire.

After the fire was put out it took several years to come back into hay land, but eventually it did come back. (R. 1739.)

Cross-examination:

I think that fire was in 1924, but I am not sure. It was a very dry year.

Mr. LILJEQVIST. Q. The whole country would burn up this year if you set it afire?

A. Why, yes.

Q. When you first knew that west part of the (Malheur) lake you couldn't set it afire, could you?

A. What?

SPECIAL MASTER. He wishes to know whether you could set the west part of the lake afire in the days when you first knew it.

A. No; I don't believe you could.

Mr. JUDD A. WISE, called as a witness for the plaintiff, testified in substance as follows:

I remember the tule fire that they had down there (near Malheur Lake) in 1924. (R. 1953.) It burned clear up to what we call the Narrows, and I do not know just exactly whose place it was; it was down there in the middle of the swamp; that is, within the boundaries of the (Lake Malheur) Bird Reserve. I was hired down there by the Game Warden, Mr. Benson, although I am not sure of that, to help fight the fire. I believe there must have been 25 or 30 men employed, anyway, to fight it. The method we used to fight the fire consisted of the use of wet sacks, and that was about all we could do. We got the water for the sacks out of a well; from wells around the edges of the ranches. There was no lake water to use. (R. 1954.) It burned the tules, the plants, and then it burned, I would say, six or eight inches deep into the ground in lots of places, and twelve inches in some other places. The soil that burned is known as peat.

I think that fire burned ten or fifteen days; the ground probably burned longer than that, but I do not know; I was there just a couple of days. (R. 1955.)

Cross-examination:

The vegetation that burned was about twelve inches deep; not all of it, but some of it that burned was twelve inches deep.

Mr. ALVA SPRINGER, called as a witness for the plaintiff, testified in substance as follows:

I cut some hay on my property this year. (R. 2023.)

Mr. ALFRED L. MARSHALL, called as a witness for the plaintiff, testified on cross-examination as follows:

I believe I remember in 1922 a party of Government and some State officials came in there (Malheur Lake). I remember you; I remember speaking to you on the grade between Billy Dunn's place and Springer's place.

I do not remember just exactly about the water in that particular year, but there has been so many years—now, I remember very plainly it has never—it has been a good many years, but what we have mowed down the west line of our fence plumb to the Spring Branch in order to give our stock water. The tules would get pretty high in places, and they are there yet. And we would mow a broad

strip from the ground that we had mowed for hay and was used for hay and pasture; when these tules were pretty high we would mow a pretty big broad strip down to the spring water place, because that was a good watering place, and easy for cattle; and in that way the stock would go through the tules and find the water and would not do without water for so long before they would break a road; and we have done that, and always (have) done that. (R. 2085.)

Mr. JOHN EMERY GRAVES, called as a witness for the plaintiff, testified on cross-examination in substance as follows:

I remember when Mr. Staley, Mr. Marr, Mr. Stanley Jewett, Doctor Hibbard, Mr. Percy Cupper, and you (Mr. Liljeqvist) were down there to my place.

Mr. LILJEQVIST. Q. And at that time you drove us out in a rig, away out there to this pump house, didn't you?

A. We didn't have a pump house there then; but then we went to the cabin, wasn't that it?

Mr. LILJEQVIST. I think so. That was where Stanley Jewett got all the bats.

A. Yes.

Mr. LILJEQVIST. You might read into the record that he found 500 varieties at that time. I think Mr. Jewett ought to testify to that.

Q. Didn't you have to take us out in a wagon through the water for a couple of miles?

A. I think I did all right. (R. 2124.)

Redirect examination:

The pump house that Mr. Liljeqvist referred to is quite a pump house; the pump is right close to it; about 20 or 30 feet from where I have my pumping plant. I have a well there which is 64 feet deep; then I have a little power pump on it, a little engine. I used to pump the water there for my stock. I have stock. That is the only way I have of getting water.

As a general thing the water of Malheur Lake is fit for the stock to drink. (R. 2125.)

Recross-examination:

I dug the main well practically two years ago; then last year I put it down deeper.

When I first went in there I did not need a well. (R. 2126.)

Mr. JOE ORMAND ATSMUS, called as a witness for the plaintiff, testified in substance as follows:

I have had some experience down there (in Malheur Lake) with discovering buffalo heads. We found them all over the central portion of the (Malheur) lake.

With reference to my grain field we found quite a number of them right along the north edge of the grain field; then we found them

scattering all over the grain field; also to the south, outside of the fence; we found them all over that portion there.

I have ofttimes dug them out about a foot below the surface (of the ground), and found a little grain sticking up; I have dug out whole carcasses, and found decayed vegetation (R. 2131) directly under the skeletons; right under the skeletons, and there were tules there.

In the last two or three years I found a few green sprouts of willows coming up along the tule line in that part (the grain field) of the (Malheur) lake. (R. 2132.)

Mr. CHESTER W. PECORE, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

There is a drainage from the open body of water of Malheur Lake, lying between Cole Island on the east and Doc. Graves' pump house on the west and down within about two miles of the meander line on the south, up to about two miles of the meander line on the north, that open body of water out there by the tules has sort of a drainage channel into the Narrows. The lowest point in that channel is somewhere about 4,091½ or 4,092 feet elevation; there is a ridge or dike in there so that when the water in Malheur Lake got down below that elevation, it would not longer drain through the Narrows; therefore, the water would stand in a pool out from the margin of the tules toward the center of the lake, and after the drainage down through the Narrows had stopped on the surface, there might be a considerable area of open water out there. (R. 2285–2286.)

Mr. THOMAS L. VICKERS, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

We had a good run-off in about 1922. The water came down from the other side (south side of Malheur Lake) and flooded that country in there from the (R. 2315) Blitzen River. (R. 2316.)

Mr. GEORGE M. BENSON, called as a witness for the defendant, testified in substance as follows:

Mr. LILJEQVIST. Q. Now, Mr. Benson, you remember when this party of State and Government men, including Mr. Staley here, went to Graves' house out there toward the bat house in 1922?

A. Yes.

Q. Can you describe the course we went, and what we went through, and how we went, and the waters as they actually existed?

A. We started from Doc. Graves' in a wagon, and Doc forded all his channels between the islands—that was the object of the team, to take us across the water area between those knolls. Then we went down through this deep channel. Then we left Doc. there—Doc. could not go any farther—and we went across the stream in a boat, and then all the bunch of the men walked on down to the bat house and waded another slough, I guess. (R. 2533.)

Q. Mr. Benson, in addition to the place marked on this Plaintiff's Exhibit 3, where the buffalo skeletons were found, will you state what other area in there, if any, you found buffalo skeletons upon or in.

A. I found a buffalo head and an elk head right up in here [indicating].

Q. About 3 inches southwesterly of the contour line 68.8 with a blue cross on it—is that right, on the map Plaintiff's Exhibit No. 3?

A. Yes; west of the north tower, clear west across the Big Grain Field. I found 31 in one bunch, and then down here [indicating] I found some big ones, just about half a mile easterly of where "buffalo skeletons" is marked on the map, and scattered all over the west of Cole Island, all over that area.

Q. Did you find peat in there too?

A. Yes, there's peat there. (R. 2534.)

Cross-examination:

Mr. COLLINS. Q. With reference to these buffaloes, have you formed any opinion after your examination of them, after your discovery of them, their positions, and so forth, as to their probable death?

A. In my examination of the positions and the bones, it seems to me just a matter of wading out to the highest water, the water receded and they just got mired in the mud and died that way.

Q. Have you talked to anyone about that, or is that your independent opinion?

A. Independent. No, I have studied that out myself all through that area in the center of Malheur Lake, including the Big Grain Field. (R. 2539.)

Redirect examination:

Mr. LILJEQVIST. Q. These buffaloes. The reason that you judged they walked out to the water and got stuck in the mud was because of what?

A. Well, watching the receding of the water this last dry year, where the water went out it looked like it was just about in line with where these buffalo were getting to, from each side—it seemed to me that is about the same way that the cattle followed this water out.

Q. These buffalo were found in the deepest part of the lake, weren't they? (R. 2542.)

A. Practically all over it. When the water went down, they would mire in the mud and go down.

Q. Was there anything particularly noticeable about the position of the bodies or the bones?

A. It seems to me that all that I dug up that the feet were always down in the mud, underneath the bones. Its feet was liable to be on top, but usually the feet lay out in the way a cow will mire.

Q. Did you find many instances where the feet were on top of the ground?

A. I always found the leg bones below—deeper down. (R. 2543.)

h. Depths in the early days

Mr. LEE MINIS CALDWELL, called as a witness for the plaintiff, testified in substance as follows:

Our horses broke through the ice lots of times, but never through any water with a depth sufficient for swimming them. The water always came up to the sides of the horses; it was perhaps three or four feet or a little more in depth, and when the water came to the horse's side; that included the distance he would be standing in the mud. The bottom of the lake was mushy where we broke through the tules. (R. 142.)

Mr. THOMAS GEORGE HOWSER, called as a witness for the plaintiff, testified in substance as follows:

When I was twenty years old, I went in a rowboat with two others down the Silvies River from just below Lawen into the tules in the lake, duck hunting. Right at the edge of the water of Malheur Lake there, the water would be an inch or so deep, and you would have to go a quarter of a mile in from the bank from where you started to get to a depth of one foot. (R. 219–220.)

The depth of the water in some places was not as much as six or eight inches when we were going out into the lake; it was very shallow in some places. (R. 220.)

Mr. THOMAS J. VICKERS, called as a witness for the plaintiff, testified in substance as follows:

For two or three years I swamped cattle in Malheur Lake, and once or twice I broke through the ice. (R. 250.) The water would come up to his mid-sides sometimes, depending upon the kind of place it was; there might be potholes there; there would be an open space in the ice, something like that, to drop through; when the horse broke through, the water was not deep enough for him to swim in there; he couldn't get out; if he could get out on his feet he could travel, and sometimes we had to pull him out. In those days we would dig him out and pull him out; with some help you would get him out of there. The water has to come up over his back, and a little more, before it will float him, so that he can swim. (R. 251.) At the times I broke through the ice the water did not come up that far on the horse; he didn't go clear out of sight, so that I never got thrown off the horse into the water (R. 251–252); the only water there was under the ice; my horse was in the water but I was on the ice. (R. 252.)

Mr. JOHN GARDNER, called as a witness for the plaintiff, testified in substance as follows:

In trapping on Malheur Lake, we would go in boats in the water time; sometimes the water was six inches, sometimes three or four feet; you could tell by putting your oar down in the water and mud.

We had gum boots and pulled our boats over some of the places. (R. 267.) In sticking the oar down into the mud and water you can not tell how much mud there is and how much water. You might have a foot and a half of mud and water. Generally, I made an oar eight feet long, and would stick it down about half way and there would be mud and water on the oar. Lots of times we got out and pulled the boat in about an inch, and in some places four inches, of water. (R. 268.)

In the good water years, when we would get plenty of water and the water is running all over the country, we do not get much greater depths in Malheur Lake. Generally it comes up a little and makes a hay crop, but it always goes back generally so that you can get hay there. When the water spreads, it is a shallow lake, and then it evaporates and goes away. (R. 281.) Maybe it would be six inches deep for a mile or two miles. When you get more water, you do not get very much increased depth, but a greater spread in area. In so far as the operation of boats is concerned, the flood waters do not help very much.

I saw Louis Thompson, whom we called "Pinto Tom" because of a white spot on his head, break through the ice on Malheur Lake, and his horse drowned. He jumped off his horse as it went down in the water. There was more mud than there was water. (R. 283.)

Cross-examination:

One time there was water belly deep on a cayuse in the channel that goes by Scott Haley's place. (Scott Haley's place is located just about an inch on the map, Plaintiff's Exhibit 3, practically east of the Neal meander corner of sections 17 and 18, T. 26 S., R. 32 E.) (R. 292.)

Mr. DARIUS HYNSON SMYTH, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. Have you ever had occasion to observe the depth of this (Malheur) lake?

A. I have been on horseback over it a good many times, all over it. In dry seasons and wet seasons.

As far as the depth was concerned, it did not make very much difference whether the lake was high or low. What the average depth of that lake out along the open water would be is an awfully hard question to answer, on account of the sloughs and ridges, and it would be very hard to tell about that.

Mr. BLACKMAR. I assume in some of the sloughs that you have been in that it was so deep that you had to swim your horse?

A. Not in the lake; no. (R. 462.)

I never did swim my horse in Malheur Lake. (R. 462–463.) The deepest the water would come would be to a little more than belly deep on the horse. Over on the edges of Malheur Lake, the depth would not be anything. There was no shore there.

Mr. BLACKMAR. Q. So that a man on horseback could ride out some distance before the water would come up to his horse's knees?

A. I should say he could.

Q. How far, about?

A. I couldn't say as to that, it is just according to what part of the lake it was. The lake is in so many different shapes there, I couldn't answer that question. (R. 463.)

Mr. PRIM ORTEGO, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I have never measured the depth of the water of Malheur Lake; that is outside of my business, and I did not go in the direction of water.

Mr. LILJEQVIST. Q. You know that a lot of cattle broke through and were drowned in the early days; isn't that a fact?

A. Yes; I do not know whether they were drowned; they go in the mud and could not get out, and died, of course. (R. 529.)

Mr. JAMES THOMAS BAKER, called as a witness for the plaintiff, testified in substance as follows:

Mr. BLACKMAR. Q. What depth did the water appear to be?

A. I wouldn't say. Of course, it would be mud and water, but I couldn't say. Two or three feet of mud, probably, and two or three feet of water where they would break through lots of times. (R. 577–578.)

Mrs. OLLIE DARSEY, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

When I went rowing in Malheur Lake with my husband (1907–1909) I have put the oar, which was six feet long, down into the water frequently to determine the depth of it. The water did not come within a foot or a foot and a half of the top of the end of the oar; and some places it was three or four feet; it was according to how deep it would go into the mud. We never did find five feet of water in Malheur Lake at any time we were on it. I would not say the greatest depth we found, I do not think it was over four feet, if it could have been that. It might have been between four and five feet, but I do not think so. I do not think it was over four feet.

Mr. LILJEQVIST. Q. You mean the water itself?

A. Yes; the water itself.

Q. You are not figuring on mud below the water?

A. There is lots of mud.

Q. And that mud was so light that the oar would go right down to hardpan, wouldn't it?

A. Yes.

Q. And when you put it down and let it go to hardpan, it nearly went to the end of your oar?

A. Yes, sir.

Q. Did it ever go over your oar?
A. No, sir. (R. 663.)

Mr. GRANT THOMPSON, called as a witness for the plaintiff, testified in substance as follows:

I do not know that I have lost any cattle in Malheur Lake in the winter by breaking through the ice; I have helped to run cattle out of there in the winter when they were on the ice; I broke through once, but it is pretty hard to determine the depth of the water; but as I told you, the lake bed was very muddy; I don't know how deep it was. The horse sank into the mud, but the water when he got on his feet, was mid-sides to him—to the top of the ice.

It happens sometimes down in that vicinity even in the fall months of the year, that the cattle get out there and mire down; I have helped pull cattle out of there different times, out of the mud around the edges of the lake. (R. 713.)

Mr. CAMPBELL C. KILBURN, called as a witness for the plaintiff, testified in substance as follows:

During the time I worked with cattle down in Malheur Lake I have broken through the ice frequently. I found some water was deep, while at other places it was not so deep. There were places in there that was over a horse's back, and other places would be mid-side up to the cinch.

Mr. BLACKMAR. Q. Places where it was over a horse's back were in sloughs and back-water places? (R. 731.)

A. Well, at that time we did not know but what the lake as a whole—that is, the lake proper was that way, but since the lake went down I have been over quite a big portion of it, and there are low places and swales, as you see the surface of the ground. Some places the water was deeper, and in other places the water was not so deep. (R. 732.)

Mr. JOHN L. HEMBREE, called as a witness for the plaintiff, testified in substance as follows:

We used to measure the water (of Malheur Lake) at different times; we found there was no time at all that we could not reach the mud, or the bottom, or the earth, with our oars, which were six or seven feet long; we always termed (R. 896) that it was from five to six feet of water from the Narrows up the channel; or an average like that (R. 897).

Cross-examination:

Mr. LILJEQVIST. Q. And when you stuck the oar overboard, trying to find out how much water there was, it was the depth that you have already testified to?

A. Yes. That was not any time of the year. That was during the high water. It varied, and went down to summer depth.

At times it would go from, I will say, up in the lake there, from around four feet, and then it has been as deep as between five and six feet, as we would term it, up on the oar; and those times that we attempted to experiment, us young fellows, there was no time but what we could reach the bottom of the mud with the oar, which was about six or six and a half feet long. (R. 907.)

Mr. JAMES M. BRANDON, called as a witness for the plaintiff, testified in substance as follows:

When we rode through the Hill place with the cattle crossing the lake we rode in the channel that was there, and the water was about three feet deep in the middle of it, then there was mud under that. (R. 964–965.)

Mr. JOSEPH WILLIAM CLARK, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I do not believe I ever saw the water measure four feet on the Neal meander line on the south side of the Ruh's place, but I saw it, I should judge, a foot deep; but I do not think I ever saw it measure four feet deep, as I remember. (R. 1041.)

Mr. JOHN H. WITZEL, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

I have been on horseback on the ice on Malheur Lake when the horse has broken through; he went down I presume pretty nearly half-side deep; and he surely and undoubtedly touched bottom because he never went under the water. We have drowned a good many cattle there, and in some places (where they broke through the ice) the water went over their backs (R. 1120) and in other places, it would not.

Mr. LILJEQVIST. Q. Well, isn't it a fact that time your horse broke through you had to put ropes on him to get him out, and he didn't even touch bottom, and you so stated?

A. No; it is not a fact that he didn't touch bottom. He touched bottom. If he hadn't of touched bottom, why—he was touching bottom all the time. He wasn't under water. (R. 1121.)

Mr. LEROY BUNYARD, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

The time we did our hunting where the Silvies River ran up to south of Gregory's place at the Sand Reef, when we got out into the open water beyond the tule lines, we found it was not very deep in the fall of the year; we did not measure it, but probably it was a foot or two of water and about five feet of mud. It was very light mud; for a short distance it was there, then it soon stiffened up. We hunted in an area of about two miles, perhaps a little farther, along the northside of Malheur Lake. (R. 1159.)

Mr. JAMES HENRY GIBSON, called as a witness for the plaintiff, testified in substance as follows:

On the lower part of my place next to the lake, the water has been a couple of feet deep many times. (R. 1174.)

Dr. LLEWELLYN EUGENE HIBBARD, called as a witness for the plaintiff, testified on cross-examination as follows:

May I make a statement as to the depth of the water. I found in the years (1918 to about 1924 or 1925—R. 1632) I had anything to do with it (the Lake Malheur Reservation) in making these collections, I have been out in most all places in the (Malheur) lake, and while I did find it up to my mouth in a few places, I always felt safe, and while I did find it clear up to my mouth, more often the water would strike me (R. 1633) in a general way, about the shoulder. That was what we call in the open part of the (Malheur) lake. I am five feet ten inches tall. (R. 1634.)

Mr. A. A. REINEMANN, called as a witness for the plaintiff, testified in substance as follows:

On the trips when we used the wagon we did not run into very deep water; the deepest I ever saw the water was mostly up to the running gears of the wagon.

Mr. BLACKMAR. Q. And on those trips you were going to what particular part (R. 1672) of the (Malheur) lake?

A. We were going north from the house. We would just go down in the lower fields there north from the house and a little bit east.

The greatest distance we would go down from the house would be easily a good half mile. (R. 1673.)

Mr. JAMES A. TURNER, called as a witness for the plaintiff, testified in substance as follows:

I remember along in the nineties, I can not tell just what year, I waded out from the shore (of Malheur Lake) to Pelican Island, when I was hunting.

With reference to the depth of the water there, where I started to wade out the water would be an inch to just below my knee there, going across. On that occasion I got clear out to Pelican Island. (R. 1726.)

Cross-examination:

That would be along in September. (R. 1726.)

Mr. MAURICE FITZGERALD, called as a witness for the plaintiff, testified in substance as follows:

On June 1, 1876, when I was with Captain Bendire in a boat and went from Malheur Slough to Pelican Island and along Pelican Island probably a mile or a mile and a half (R. 1781), Malheur Lake

was not very deep at that time between Malheur Slough and Pelican Island; that was the first time I realized that it was not a very deep body of water; before that I thought it was a very deep body of water from its appearence.

As I observed the depths that day, they varied from a foot to three feet, and maybe in points three and a half feet; it was not deeper than that along there. (R. 1782.)

Mr. EDMUND J. MARTIN, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

The time I went hunting in a boat, in the spring of 1888, about March, in the vicinity of Pelican Island (R. 1914–1916), we launched the boat right west of the peninsula (R. 1921). We got about three or four hundred yards west before I broke through (the ice) and got up to my chest. (R. 1921–1922.)

Mr. LILJEQVIST. Q. Now, that water was over two feet deep, then, at that time, wasn't it?

A. Yes, sir; it was.

Q. What was your judgment as to the depth of it?

A. We considered it about four feet deep.

Q. You considered it about four feet deep?

A. Yes.

Q. And then at that time, according to your testimony, it must have been that deep?

A. It shows on its face. (R. 1922.)

Q. How deep did you find the water in the tules?

A. Well, in some places it was—I don't think I measured it; but in some places probably two or three feet deep, you know.

Q. Did you ever step out onto the tule patches?

A. Yes.

Q. How were they; were they solid, or kind of sinking down?

A. Well, they would sink down some, I think. We didn't step out where there was water, but I remember one time there came quite a wind storm on us, and we were going with the wind, and we had the sail out, and I saw we couldn't get back, and the wind was coming in gusts, and I just pointed the boat right out into one of those islands; and we took down our sail and got out and used oars from that time on, out in the deep part of the open waters, and the depth seemed to be about the same. Those open lake parts, they all seemed to be about the same. (R. 1924.)

SPECIAL MASTER. Q. What do you mean by the same, Mr. Martin?

A. About four feet. (R. 1925.)

Mr. JOHN W. HEINZ, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

The Nine Mile Slough does go into Malheur Slough, but this was not at Malheur Slough. Where the big channel was, was what they

call the mouth of the Silvies River; then we would go out on the (Malheur) lake, and the lake was not so deep. I do not suppose the (Malheur) lake had from three to four inches of water in it. (R. 1948.)

Mr. W. A. CAMPBELL, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

Mr. LILJEQVIST. How high would the water come over that land in the springtime?

A. How high?

Q. Yes.

A. Well, now, you have the best of me. I don't know just how high. Maybe three or four inches; maybe two (R. 1980) or three feet; or maybe half an inch.

Q. Just according to how high the level of the water was?

A. Yes; according to the level of the land. (R. 1981.)

Mr. STANLEY G. JEWETT, called as a witness for the plaintiff, testified in substance as follows:

The sago pond weed that I speak of, which I observed growing in the so-called open water, west of Cole Island (R. 1997), grows in shallow water.

Mr. BLACKMAR. Q. The fact of the matter is that the growth of the weed is an indication of shallow water, is it not?

A. Yes, sir.

Q. What other plants grow in that so-called open water?

A. Well, there is the so-called arrowleaf.

Q. Is that also a shallow water plant?

A. Yes. (R. 1998.)

Mr. JOHN EMERY GRAVES, called as a witness for the plaintiff, on cross-examination testified in substance as follows:

There were places it (the water) never got over the ridge (that leads out from my deeded land—R. 2118); and then there were other places that there was probably two feet of water. In some places you would have to go through in narrow channels. Part of that ridge never did (become) overflowed. I would say the majority of it, or the biggest part of it, never did become overflowed; that is, there might have been probably three inches of water over practically a third of it, and then the other was mostly above water on the ridge. (R. 2120.)

I went across there (Malheur Lake) on horseback, I think the second time I was out here. It was along in November or December, I think. In the spring of the year the people did not use it (the road across Malheur Lake) for a crossing very much. Some of them will tackle it, but others (R. 2123) will not. (R. 2124.)

Mr. JOE ORMAND AUSMUS, called as a witness for the plaintiff, testified in substance as follows:

I saw evidence of willow trees down there in the (Malheur) lake; we turned some up with the disc when we were getting ready to plant it (the ground) to grain.

Mr. BLACKMAR. Q. How did you identify those as being parts of a willow tree?

A. I have lived around springs a good deal, and I have taken out these old decayed roots, and they resembled them very closely—the bark and the roots, and the shape of them, too.

The willow root that I have just referred to was not a long willow; that was an old relic. (R. 2132.)

Recross-examination:

I think I know pretty nearly how much the rise and fall of the (Malheur) lake is in the summer time. Just off of Cane Island the water in average high-water years stands about a foot in the winter, and about three feet in the summer, in high water, as nearly as I could locate it. (R. 2139.) That is just below Cane Island. (R. 2140.)

Mr. WILLIAM L. FINLEY, called as a witness for the plaintiff, testified in substance as follows:

In May (R. 2299), 1908, I made a trip with Mr. Herman T. Bohlman to make a survey of Malheur Lake from the bird and animal standpoint. (R. 2298–2299.) We were down there during the latter part of May, June, and returned the first part of July (R. 2299), and at that time with reference to the depth of the water through those tule marshes (R. 2301), it was a little deeper, I think about 5 or 6 feet, until we got out into the part beyond (Bill) Marshall's place. You see the water comes down and beyond (Bill) Marshall's place it spreads out, and from there part of it, as I remember, is 5, 6, or 7 feet (deep), but when you get out beyond that tule growth the whole bed of the (Malheur) lake would ordinarily average not more than 2½ to 3 or 4 feet, because we frequently put an oar down and pulled along in many of these places; of course, in some places the mud was deeper than that. (R. 2302.)

Since 1908, I have made several trips to Malheur Lake. Without my notes, I do not know that I can recall the exact years. I was down there with Dallas Lore Sharp from Boston in 1912; then I have been down there in the fall of 1917, and saw the swans in large numbers. I went down there with Lewis I think about 1915. I have not been there recently. (R. 2303.)

With reference to the stage of water since 1908, in 1912 it had lessened, but not a great deal of change that I recall from 1918 (1908) to 1917, except lowering a little. (R. 2304.)

(No cross-examination.)